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TOWARDS A BALANCE OF INTERESTS FOR THE INVESTOR-STATE IN CASE LAW

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Abstract: The present paper aims to investigate the relationship between the principle of sustainable development and the solution that is found through a logical and decisional modus in the Investor State Dispute Settlement-ISDS. In particular, the arbitral awards are many and the case-law refer or not to the principle, notion of sustainable development, that has invoked, enhanced the interpretation of Art. 31 of the Vienna Convention on the Law of Treaties. In this way, the canons of a legal logic are used among the reference principles of a jurisprudence that is in the spirit of a line of logic consistent with the principles of international law.

Keywords: sustainable development; international investment law; arbitral awards; Art. 31 VCLT; clean hands control; ISDS; ICSID; ILA; IIAs; UNCITRAL; CETA; BITs; investor-state case law; police power doctrine; corporate social responsibility.

INTRODUCTION

Sustainable development has a decisional basis in the resolution of disputes based on Investor State Dispute Settlement-ISDS, through arbitration case-law. Sustainable development invokes and enhances the interpretation of treaties, according to Art. 31 Vienna Convention on the Law of Treaties -VCLT, as the basis of a legal logic and as a figure that refers to the jurisprudential precedent through the “consistent line of reasoning” (Hollis, 2020).

The interpretation identifies sustainable development and arbitrators through seven principles of the declaration of New Delhi of ILA , affirming that:

“(...) together, provide considerable guidance for jurists seeking ways to balance conflicting or overlapping social, environmental and economic obligations (...)” (Van Harmelen, Van Leeuwen, De Vette, 2005).

The ILA Sofia Guiding Statements of 2012 (French, 2017) highlights the consistent interpretation of sustainable development that:

“(...) treaties and rules of customary international law should be interpreted in the light of principles of sustainable development (...)”.

This is a series of rules to the ISDS system, that through the doctrine of clean hands control of legality clauses and the definition of protected investments in procedural instruments, makes the arbitration system transparent and participatory (Buckley, Sander, Stein, Karr, 2024).

These are instruments that make use of the case law that is based on the Sofia Guiding Statement n. 7, which states:

“(...) principles of public participation and access to information and justice are foundational to sustainable development, and judicial and quasi-judicial bodies must seek to affirm this in their substantive decisions and, as applicable, as elements of their own procedure (...)”.

The principles of sustainable development identify the decision that allows to judge and balance the interests of the state that receives the investment of private investors, according to the principle of integration that finds space in

the Sofia Guiding Statement n. 9 (Gottlieb, 2024).¹

INTERPRETATION OF TREATIES AND SUSTAINABLE DEVELOPMENT

According to Art. 31VCLT, the valorization of sustainable development² codifies customary rules that impose as their intent objectives that are interpreted in each individual case (Baroncini, Brunel, 2019; Hollis, 2020).³

¹According to Sofia Guiding Statement n. 9 is declared that: “(...) principle of integration and inter-relationship is the primary means by which courts and tribunals provide an overarching conceptual framework for sustainable development. In support of the principle of integration and the expectations of standards of due process, integrative decision-making and good faith negotiations should be further strengthened (...)”.

²Art. 31, par. 1 VCLT affirmed that: “(...) treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose (...)”.

³Baroncini, Brunel affirmed that: “(...) pursuant to the international customary rules for treaty interpretation, codified in Article 31, paras. 1 and 2, of the Vienna Convention on the Law of Treaties, an agreement ‘shall [not may or can!] be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose (...) includ[es] its preamble,’ i.e. that part of an agreement usually disclosing the purpose

The Saluka award is immediately recalled which states:

“(…) “object and purpose” of the Treaty may be discerned from its title and preamble (...)”.⁴

This is a compliant interpretation that has as its objective the treaty that was concluded in the Whaling in the Antarctic case of the ICJ in 2014 (Liakopoulos, 2020a).⁵ In this regard, it was Australia that accused Japan of using Art. VII of the International Convention for the Regulation of Whaling in 1946, namely the International Convention for the Regulation of Whaling-ICRW, which exceptionally allowed the killing and hunting for scientific purposes as was used by Japan to reduce the placing on the market of whale meat that was sought in the local market.

The objective of the convention has to do with the conservation of whales, through sustainable exploitation, as stated in par. 56 of the sentence:

and mission assigned by the contracting parties to the treaty (...) a mandatory treaty interpretation perspective is hence constant, not linked to any circumstances (...)”.

⁴Saluka Investments B.V. v. The Czech Republic, UNCITRAL, Partial Award, 17 March 2006, par. 299.

⁵ICJ, Whaling in the Antarctic (Australia v. Japan: New Zealand intervening), Judgment, I.C.J. Reports 2014, p. 226.

“(...) preamble of the ICRW indicates that the convention pursues the purpose of ensuring the conservation of all species of whales while allowing for their sustainable exploitation (...)”.

In practice, the ICJ has interpreted that Art. VIII of the convention, in accordance with the object of the treaty, takes into account the conservation and sustainable exploitation of whales⁶ arriving at condemning Japan for the revocation of the permits relating to the scientific hunting programs.

Art. 31 VCLT avoids interpretations that exhaust the object of the principles of the ILA and the protection for the investor and his investments since:

“(...) purpose of the Treaty is to promote and protect investments (...),⁷ thus reducing International Investment

⁶ICJ, Whaling in the Antarctic (Australia v. Japan: New Zealand intervening), op. cit., par. 55: “(...) Article VIII is an integral part of the Convention. It therefore has to be interpreted in light of the object and purpose of the Convention (...)”. In par. 57: “(...) Australia and Japan have respectively emphasized conservation and sustainable exploitation as the object and purpose of the Convention in the light of which the provision should be interpreted (...)”.

⁷Siemens A.G. v. Argentina, ICSID Case No. ARB/02/8, Award, 17 January 2007, par. 300.

Agreements to (...) property rights protection treaties
 (...)”.⁸

This is a unique interpretation towards a path that reduces other theories such as for example the position of Weibel, who stated:

“(...) ideological prior of maximal investment protection
 (...)” (Waibel, 2011),⁹

⁸Van Aaken noticed that: “(...) it is, for several reasons, untenable to suppose that investor protection is the only purpose of an IIA (...)”.

⁹Waibel affirmed that: “(...) appear to be few distinct patterns of treaty interpretation in investment arbitration, aside from an excessive reliance on the treaty’s object and purpose. Relying on the goal of maximizing investor protection as a default rule has its pitfalls (...) interpretative approach betrays a cavalier attitude to treaty in interpretation (...) favouring broad investment protection and construing the ordinary meaning of ambiguous treaty terms in light of an ideological prior of maximal investment protection is thin-tribunals cross it at their peril. In such cases, the interpreter’s prior of maximal investment protection as a good onto itself lurks visibly behind such outcome-driven interpretative strategies. The risk is a re-politicization of investment disputes and, in the long-run, losing support among state parties (...) rule in *dubio pro* investor derived from the BIT’s object and purpose of maximizing investor protection, which criticized as an automatic rule earlier, [...]”.

or a tendency that for many arbitration awards was an attitude to the interpretative rules of the VCLT which stated:

“(...) relying on the goal of maximising investor protection as a default rule has its pitfalls (...)” (Waibel, 2011).¹⁰

It was also Scheu who highlighted the protection of the investor, which constituted the object and at the same time the objective of the treaty. This is an objective interpretation which traces the objective for the ILAs towards the promotion of the economic development of host states. In fact, the:

“(...) object and purpose of the Treaty is not to protect foreign investments *per se*, but an aid to the development

¹⁰Waibel affirmed that: “(...) Investment tribunals often profess fidelity to the rules on treaty interpretation contained in the Vienna Convention on the Law of Treaties (VCLT) (...) Article 31 and 32 VCLT with reassuring regularity. But first impressions may lead astray. My hypothesis is that many investment awards demonstrate a cavalier attitude to treaty interpretation (...) declarations of fidelity to the foundational principles of treaty interpretation, however, lack practical substance if tribunals soon thereafter pour cold water on their stated intentions. I contend that careful application of the principles of treaty interpretation to the facts is often wanting in investment arbitration (...)”.

of the domestic economy (...)”,¹¹

which improves the socio-economic conditions and the well-being of the population in a definitive way and the promotion for sustainable development as

“(...) investment law’s veritable purpose is to promote sustainable development (...)” (Scheu, 2017).

Art. 31, par. 3 VCLT allowed a systemic interpretation of an evolutionary nature of the treaty, i.e. an interpretation that reads each individual treaty according to other rules of international law thus avoiding that it operates:

“(...) wholly independently¹² (...) in reference to other rules of international law in the course of interpreting a treaty (...)” (McLachlan, 2005; Hollis, 2020).

The arbitrators interpret the single BIT in a general context of international law and not as an instrument of an isolated

¹¹Joseph Charles Lemire v. Ukraine, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, par. 273.

¹²ICJ, Oil Platforms (Islamic Republic of Iran v. United States of America), Judgment (6 November 2003), I.C.J. Reports 2003, p. 161, par. 41: “(...) interpretation must take into account any relevant rules of international law applicable in the relations between the parties (Art. 31, para. 3 (c)). The Court cannot accept that Article XX, paragraph 1 (d), of the 1955 Treaty was intended to operate wholly independently of the relevant rules of international law on the use of force (...)”.

nature and as a legal vacuum (Gordon, Pohl, Bouchard, 2014).¹³ This is an expression of case-law of the WTO, as in the US-Gasoline case of 1996,¹⁴ where the IIAs are not considered as clinical isolation from public international law. The systemic interpretation helps to render international law at a universal level (Pauwelyn, 2004; Lindroos, Mehling, 2006).

For example, the *Phoenix v. Czech Republic* recalled the US-Gasoline case stating:

“(...) ICSID Convention's jurisdictional requirements-as well as those of the BIT-cannot be read and interpreted in isolation from public international law, and its general principles (...)”.¹⁵

¹³Gordon, Pohl, Bouchard: “[t]his would seem to imply that investment arbitration tribunals should interpret and apply IIAs in their general context, that is taking into customary international law, general principles of law and consideration rules and principles from other fields of international law, including bodies of law relating to SD/RBC, where relevant and applicable (...)”.

¹⁴Appellate Body Report, United States-Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R of 20 May 1996, par. 17: “(...) General Agreement [GATT] is not to be read in clinical isolation from public international law (...)”.

¹⁵*Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5.

In this way, international investment law does not constitute a legal regime of a separate nature given the AAPL v. Sri Lanka which states:

“(...) not a self-contained closed legal system limited to provide for substantive material rules of direct applicability, but it has to be envisaged within a wider juridical context in which rules from other sources are integrated through implied incorporation methods (...) international law character or of domestic law nature (...)”.¹⁶

Award, 15 pril 2009, par. 78: “(...) Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable (...)”. Autopista Concesionada de Venezuela, C.A. v. Venezuela, ICSID Case No. ARB/00/5, Award, 23 September 2003, par. 207: “(...) well accepted practice that the national law governing by virtue of a choice of law agreement (pursuant to Article 42(1) first sentence of the ICSID Convention) is subject to correction by international law (...)” and in Duke Energy International Peru Investments No. 1 Ltd. v. Peru, ICSID Case No. ARB/03/28, Decision on Jurisdiction, 1 febbraio 2006, par. 162 : “(...) even if the law of Peru were held to apply (...) this Tribunal has the authority and duty to subject Peruvian law to the supervening control of international law (...)”.

¹⁶Asian Agricultural Products Ltd. (AAPL) v. Sri Lanka, ICSID Case No. ARB/87/3. Award, 27 June 1990, par. 21.

In the ICSID Urbaser award of 2016 it was stated that:

“(...) BIT is not a set of self-contained rules (...) the BIT cannot be interpreted and applied in a vacuum (...) BIT has to be construed in harmony with other rules of international law of which it forms part, including those relating to human rights (...)”.

Consequently, Art. 31(3)(c) is defined as a master key in international law. A means that allows the application of an external rule of the treaty that is relevant, applicable between states-parties to the treaty (Simma, 2011; Rosenttreter, 2015; Hollis, 2020).¹⁷

All multilateral treaties of the UN on human rights are considered to be relevant and applicable. They are equipped with ratifications of a universal nature, such as the International Covenant of civil and political rights of 1966. Even if they are not ratified, the states-parties to the treaty to be interpreted the provisions on human rights bind *erga omnes* obligations (Simma, 2011).¹⁸

¹⁷Simma affirmed that: “(...) was termed no less than the “master key to international law”, by the International Law Commission, codifying the so-called “systemic integration” of treaties, and is by now itself part of customary international law (...)”.

¹⁸Simma affirmed that: “(...) more complicated if such treaty

The ICSID award *Tulip v. Turkey* recognizes a systemic interpretation for human rights

“(…) a widespread sentiment that the integration of the law of human rights into international investment law is an important concern (…)”.¹⁹

The systematic interpretation for arbitrators takes into account what is applied, according to the former Art. 31, par. 3, letter c) of the human rights treaties, that are concluded by home state and host state. They are ratified by one of the two, or both since they are *erga omnes* obligations (Scheu, 2017; Santacroce, 2019; Hollis, 2020).²⁰ A

membership does not overlap, though this challenge may be met by resorting to the concept of obligations *erga omnes* (...) the concept of obligations *erga omnes* might still help us to secure economic and social human rights law as rules of international law applicable in the relations between the parties (...)”.

¹⁹*Tulip Real Estate and Development Netherlands B.V. v. Turkey*, ICSID Case No. ARB/11/28, Decision on Annulment, 30 December 2015, par. 86 and 92: “(...) in human rights instruments dealing with the right to a fair trial and any judicial practice thereto are relevant to the interpretation of the concept of a fundamental rule of procedure as used in Article 52(1)(d) of the ICSID Convention (...)”.

²⁰Scheu affirmed that: “(...) human rights treaties which have been ratified by all contracting states to the investment treaty are to be taken into account pursuant to Article 31(3) (c) of the VCLT (...) Human rights treaties

precise systemic and evolutionary interpretation is affirmed by Art. 31, par. 3 VCLT, which allows an effective application of the treaty and reveals a hermeneutic canon in favor of the principle of sustainable development (Hush, 2018).²¹

that have been ratified only by the host state are also relevant because no investor can reasonably expect that the host state would be willing to ignore its own international human rights obligations (...) human rights obligations assumed by the investor's home state are also to be taken into account (...) human rights obligations of the host and the home state should be shaping the tribunal's understanding of what constitutes a legitimate public policy regulation". Santacroce affirmed that: "(...)“(i) the fact that international human rights law is part of international law, which in turn governs the merits of investment disputes; (ii) the presence of express references to human rights in the investment treaty; (iii) the presence of implied references to human rights in the investment treaty; and (iv) the principle of systemic integration. Each of these grounds can be the basis for applying international human rights law as an interpretative tool”.

²¹Hush affirmed that: “(...) Article 31.3 embodies the principle of ‘evolutionary interpretation’, acknowledging that the meaning of treaty provisions may develop over time. This injects flexibility and realism into the act of treaty interpretation, which may prove crucial to the achievement of sustainable development objectives (...)”.

In international law, the principle of non-retroactivity also applies, i.e. *tempus regit actum* based on facts that apply the law in force at the time of the facts. In this regard,

“(...) juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls (...)”.²²

The applicable law is identified through a *tempus regit actum* rule, which is not a static basis of its interpretation.²³ Art. 31 par. 3 VCLT, thus, interprets legal and social developments based on current conditions, according to the Tyrer v. United Kingdom case of 1978 from the ECtHR.²⁴ The principle of non-retroactivity for international law applies the law of yesterday as “law contemporary with it” also taking up expressions that are used in the Max Huber

²²Island of Palmas case (Netherlands, USA), award of 4 April 1928, in UN Reports of International Arbitral Awards, Vol. II pp. 829-871.

²³ICJ, Namibia (SW Africa) Advisory Opinion, 21 June 1971, I.C.J. Reports 1971 p.16, par. 53.

²⁴ECtHR, Tyrer v. United Kingdom (application no.5856/72), sentence of 25 April 1978, Series A no. 26, par. 31: “(...) the Convention [for the Protection of Human Rights and Fundamental Freedoms] is a living instrument which (...) be interpreted in the light of present-day conditions (...)”.

arbitrator relating to the sovereignty over the Island of Palmas of 1928. The law that interprets and takes into account legal, social developments that come from time and that from each subsequent agreement in practice puts the relevant rule of international law applicable to the relations between the parties as indicated in Art. 31, par. 3, lett. a), b), c) VCLT (Hollis, 2020).

The appeal chamber of WTO in 1998 provided an evolutionary interpretation of the GATT 1947 treaty in the US-Shrimp case. The latter has interpreted relations to a legal status for sustainable development. Some member states such as India, Malaysia, Pakistan, Thailand have activated an interstate dispute settlement procedure of WTO v. US, such as a legislation that prohibited the import of shrimp in these countries, that practiced the related trawling methods. This form of fishing killed the sea turtles that were entangled in the fishing nets thus putting them at risk of extinction.

The US used Art. XX, letter g) of GATT that allows and introduces limitations for trade to preserve the “exhaustible natural resources”. The appellants were against exhaustible resources and could not understand for

living beings the degree of reproduction.

The appeal chamber has interpreted the provisions of Art. XX GATT according to the preamble of the 1994 Marrakesh Agreement thus containing objectives for sustainable development.

For the interpretation of Art. XX of the treaty of GATT 1947 they have taken into account the signature of the treaty for the sustainable development even if it was not a topic of discussion. In this regard, it is noted that a

“(…) preambular language (…) must add colour, texture and shading to our interpretation of the agreements annexed to the WTO (…)”.²⁵

The evolutionary interpretation of Art. XX, point g) highlights exhaustible natural resources that reads the contemporary concerns according to the international

²⁵See par. 153: “(…) this language demonstrates a recognition by WTO negotiators that optimal use of the world’s resources should be made in accordance with the objective of sustainable development (…) preambular language reflects the intentions of negotiators of the WTO Agreement, we believe it must add colour, texture and shading to our interpretation of the agreements annexed to the WTO Agreement, in this case, the GATT 1994 (…) observed that Article XX(g) of the GATT 1994 is appropriately read with the perspective embodied in the above preamble (…)”.

community for the protection of the environment (Baroncini, Brunel, 2019)²⁶ also including living natural resources such as sea turtles.

In fact, according to par. 149:

“(...) words of Article XX(g), “exhaustible natural resources” (...) were actually crafted more than 50 years ago (...) treaty interpreter in the light of contemporary concerns of the community of nations about the protection and conservation of the environment (...) Article XX was not modified in the Uruguay Round, the preamble attached to the WTO Agreement shows that the signatories to that Agreement were, in 1994, fully aware of the importance and legitimacy of environmental protection as a goal of national and international policy (...) WTO Agreement-which informs not only the GATT 1994, but also the other covered agreements-explicitly acknowledges the objective of sustainable development (...)”.

²⁶Baroncini, Brunel affirmed that: “(...) as for example indicated by Goal 12 of the UN 2030 Agenda for Sustainable Development, devoted to [e]nsure sustainable consumption and production patterns, the protection of a natural resource-as dolphins-is a sustainability issue (...) as a sustainability discipline, fully respecting the principle of sustainable development (...)”.

The Appeal Chamber took into consideration the principle of effectiveness, that is the *ut res magis valeat quam pereat*, which effectively renders the object and objectives of the treaty alive in time (Baroncini, Brunel, 2019).²⁷

In this context, the ICJ recalls the Gabčíkovo-Nagymaros case.

The ICJ, in this regard, noted that the provisions of the 1977 treaty and the obligations for the parties were not static but “necessarily evolving” (Baroncini, Brunel, 2019; Liakopoulos, 2020a),²⁸ i.e. open to new emerging norms of

²⁷Baroncini, Brunel affirmed that: “(...) recent acknowledgement by the international community of the importance of concerted bilateral or multilateral action to protect living natural resources, and recalling the explicit recognition by WTO Members of the objective of sustainable development in the preamble of the WTO Agreement, we believe it is too late in the day to suppose that Article XX(g) of the GATT 1994 may be read as referring only to the conservation of exhaustible mineral or other non-living natural resources (...) in line with the principle of effectiveness in treaty interpretation, measures to conserve exhaustible natural resources, whether living or non-living, may fall within Article XX(g) (...)”.

²⁸Baroncini, Brunel affirmed that: “(...) to evaluate the environmental risks, current standards must be taken into consideration. This is not only allowed by the wording of Articles 15 and 19, but even prescribed,

international law in the environmental sector. Indeed, as it stated in par. 112:

“(...) the Treaty is not static, but open to adapt the emerging norms of international law (...)” (Baroncini, Brunel, 2019).²⁹

The parties negotiated in good faith, bringing an agreed solution with the obligation to review the relevant objectives of the treaty, as well as the effects on the

to the extent that these articles impose a continuing-and thus necessarily evolving - obligation on the parties to maintain the quality of the water of the Danube and to protect nature (...)”.

²⁹Baroncini, Barel, 2019: “(...) Court wishes to point out that newly developed norms of environmental law are relevant for the implementation of the Treaty and that the parties could, by agreement, incorporate them through the application of Articles 15, 19 and 20 of the Treaty (...) do not contain specific obligations of performance but require the parties, in carrying out their obligations to ensure that the quality of water in the Danube is not impaired and that nature is protected, to take new environmental norms into consideration when agreeing upon the means to be specified in the Joint Contractual Plan (...) provisions in the Treaty, the parties recognized the potential necessity to adapt the Project. Consequently, the Treaty is not static, and is open to adapt to emerging norms of international law. By means of Articles 15 and 19, new environmental norms can be incorporated in the Joint Contractual Plan (...)”.

environment from a project based, according to par. 140, on “new norms and standards”. Thus, international law for sustainable development was established in 1977, that is, at the time the treaty was born (Baroncini, Barel, 2019).³⁰

It is also recalled in 2005, the Iron Rhine arbitral award, which affirmed and general support the evolutionary interpretation of bilateral treaties.³¹ From the ICJ in Costa Rica v. Nicaragua case of 2009 (Liakopoulos, 2020a) an evolutionary interpretation of the bilateral treaty was

³⁰Baroncini, Barel affirmed that: “(...) the purposes of the present case, this means that the Parties together should look afresh at the effects on the environment of the operation of the Gabčíkovo power plant (...)”; par. 141: “(...) not for the Court to determine what shall be the final result of these negotiations to be conducted by the Parties. It is for the Parties themselves to find an agreed solution that takes account of the objectives of the Treaty, which must be pursued in a joint and integrated way, as well as the norms of international environmental law and the principles of the law of international watercourses (...)”.

³¹According to par. 81 of the award: “(...) Tribunal notes a general support among the leading writers today for evolutive interpretation of treaties. (...) notwithstanding the intertemporal rule, in some respects the interpretation of a treaty’s provisions cannot be divorced from developments in the law subsequent to its adoption (...) the concepts embodied in a treaty may be not static but evolutionary (...)”.

offered in relation to navigation rights and commercial purposes on the San Juan River. Costa Rica argued, in this regard, that the purpose of the treaty was expressed in the text with a generic formula, according to Art. 6, which is interpreted with an evolutionary way that includes trade in goods and tourism activities.

The ICJ, accepts, that the interpretation of Costa Rica considers that the parties use the treaty in a generic way and are aware of the meaning that evolves over time, presuming for the parties to understand the dynamic terms that are susceptible to its evolution. In fact,

“(…) parties have used generic terms in a treaty, the parties necessarily having been aware that the meaning of the terms was likely to evolve over time, and where the treaty has been entered into for a very long period or is “of continuing duration”, the parties must be presumed (….) have intended those terms to have an evolving meaning (….)” (Torp Helmersen, 2013)³².

The WTO appeal chamber of 2010 in the China-Publications and Audiovisual Products case³³ used a broad interpretation

³²Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua), ICJ of 13 July 2009, I.C.J. Reports 2009, p. 66 and 213.

³³Appellate Body Report, China-Measures Affecting Trading Rights and

based on a series of Chinese measures restricting imports and distribution in the publications and audiovisual products sector. China sought to overturn a panel finding that the measures were inconsistent with WTO obligations. It is contested that the broad interpretation concerned the

“(...) sound recording distribution services that was contained in the GATS accession schedule” (China’s GATS Schedule).³⁴

The relevant panel also stated that:

“(...) contemporary meaning of the words (...) based on the meaning of those terms at the time of interpretation (...)”³⁵

Distribution Services for Certain Publications and Audiovisual Entertainment Products, WT/DS363/AB/R of 19 January 2010. The related Chinese measures prohibited foreign investor enterprises that were based in China from importing and distributing within the Chinese territory audiovisual materials and periodical publications that requested from the situation of similar domestic products the distribution as conducted only by Chinese-owned enterprises and for subscribers approved by the Chinese government the imported recordings discriminated and earmarked electronic distribution by subjecting it to review and content requirements that comply with domestic products.

³⁴The People’s Republic of China, Schedule of Specific Commitments, GATS/SC/135, in relevance with General Agreement on Trade in Services (GATS).

³⁵The People’s Republic of China, Schedule of Specific Commitments,

so as to also include the distribution of sound recordings through electronic means, not existing at the time of the conclusion of the aforementioned schedule (...) the technique existing at the time of its adoption, and not by way of evolution, in the light of subsequent technical and scientific developments (...)."

The appeal chamber rejected the argument that recalls the case of the ICJ, namely *Costa Rica v. Nicaragua* of 2009, as well as the decision of the same appellate body on the *US-Shrimp* case of 1998 which held that the terms used in China's GATS Schedule were sufficient to be able to change and evolve over time.³⁶ Allowing the interpretation of GATS

GATS/SC/135, op. cit., par. 390: "(...) China claims that the Panel interpreted the "sound recording distribution services" according to the contemporary meaning of the words it contains, but that the principle of progressive liberalization does not allow for the expansion of the scope of the commitments of a WTO Member by interpreting the terms used in the Schedule based on the meaning of those terms at the time of interpretation".

³⁶The People's Republic of China, Schedule of Specific Commitments, GATS/SC/135, op. cit., par. 396: "(...) we consider that the terms used in China's GATS Schedule (...) are sufficiently generic that what they apply to any change over time (...) consider such reading of the terms in China's GATS Schedule to be consistent with the approach taken in *US- Shrimp*, where the Appellate Body interpreted the term 'exhaustible natural

commitments based on a time of conclusion between China's GATS Schedule is equivalent to an identical commitment containing different accession data for each member state to the same treaty. Such an interpretation seems parochial and is rejected. However, it clearly provides commitments that are contained in its own treaties (Salacuse, 2021).³⁷

resources' in Article XX(g) of the GATT 1994 (Appellate Body Report, US-Shrimp, paras. 129 and 130). See also from the ICJ the case: Judgment, Case concerning the Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua), 13 July 2009: "(...) contained in an 1858 "Treaty of Limits" between Costa Rica and Nicaragua, should be interpreted as referring to both trade in goods and in services, even if, at the time of the conclusion of the treaty, such term was used to refer only to trade in goods".

³⁷The People's Republic of China, Schedule of Specific Commitments, GATS/SC/135, op. cit., par. 397: "(...) that interpreting the terms of GATS specific commitments based on the notion that the ordinary meaning to be attributed to those terms can only be the meaning that they had at the time the Schedule was concluded would mean that very similar or identically worded commitments could be given different meanings, content, and coverage depending on the date of their adoption or the date of a Member's accession to the treaty (...) would undermine the predictability, security, and clarity of GATS specific commitments, which are undertaken through successive rounds of negotiations, and which

THE CASE LAW OF THE PRECEDENT

Interpretation is a valid entry point for sustainable development, that uses the canons of logical decision-making such as proportionality, reciprocity, good faith, reasonableness (Tanzi, 2014; Liakopoulos, 2020b) and,³⁸ which through a correct examination presents itself in a concrete and unique way.³⁹ It uses an interpretative

must be interpreted in accordance with customary rules of interpretation of public international law (...) do not consider that the Panel erred under Article 31 of the Vienna Convention in reaching the preliminary conclusion that this commitment extends to sound recordings distributed in non-physical form, through technologies such as the Internet (...)."

³⁸Tanzi affirmed that: "(...) may detect an increasing trend towards looking at the legal relationship between host states and foreign investors in more symmetrical terms (...) it appears appropriate (...) to base such an assessment on the general principles of proportionality, reciprocity and good faith in more symmetrical terms than so far interpreted and applied in investment arbitration (i.e. also considering the conduct of foreign investors and the legitimate expectations of host states about it (...))."

³⁹Continental Casualty Company v. Argentina, ICSID Case No. ARB/03/9. Award, 5 September 2008, par. 255: "(...) the content of the obligation incumbent upon the host state to treat a foreign investor in a fair and equitable manner (...) varies in part depending on the circumstances in

activity, such as the FET clauses, thus becoming an entry point for sustainable development (Kläger, 2011).⁴⁰

Decisions use the canon of proportionality to understand the exercise of state's right to regulate what is legitimately exercised through a varied analysis (Scheu, 2017), that is based on adequacy, i.e. the actual suitability that promotes a legitimate public objective that protects one of the human rights relevant to the case; necessity, which is available for restrictive measures with the degree of efficiency; adequacy, as effective suitability that promotes a

which the standard is invoked: the concept of fairness being inherently related to keeping justice in variable factual contexts (...)”. *El Paso Energy International Company v. Argentina*, ICSID Case No. ARB/03/15, Award, 31 October 2011, par. 364: “(...) Tribunal considers that FET is linked to the objective reasonable legitimate expectations of the investors and that these have to be evaluated considering all circumstances (...)”.

⁴⁰Kläger affirmed that: “(...) a general clause, fair and equitable treatment is especially apt to act as a gateway for the integration of external principles into the investment process (...) integrative flexibility of fair and equitable treatment represents a crucial tool for arbitrators to (...) balancing the interests of investors and host states with regard to their wider implications on sustainable development (...)”. The award: *El Paso* affirmed that: “(...) fair and equitable treatment is a standard entailing reasonableness and proportionality (...)”.

legitimate public objective, that protects human rights that are relevant for further investigation; proportionality, that between public objective and private interest appears as critical in value areas, i.e. health, safety, environment. It was reduced to a “scale without weights” (Jansen Calamita, 2014) and to a budgetary canon that is often “promoted and contested” (Kube, Petersman, 2016; Liakopoulos, 2020b).⁴¹

⁴¹Kube, Petersman affirmed that: “(...) balancing the reasonable, regulatory discretion of host states and investor rights is widely accepted. Proportionality as the appropriate weighing methodology has been both promoted and contested. Even if the legitimate public interest has a higher weight than the individual interests of foreign investors, it remains contested whether (...) “weighting” can justify a reduction of compensation protected under BITs (...) “proportionality” and “weighting methodologies” applied in ISDS practices are often inadequately explained. The reasons for diverging applications of the proportionality method - when compared to rights-based constitutional law systems-are sometimes unclear (...)”. In the award is affirmed that: “(...) proportional to the public interest presumably protected thereby and to the protection legally granted to investments, taking into account that the significance of such impact has a key role upon deciding the proportionality (...) must be a reasonable relationship of proportionality between the charge or weight imposed to the foreign investor and the aim sought to be realized by any expropriatory measure (...)”. In the award El Paso of 2011 in par. 243 is affirmed that: “(...) disproportionate general regulations have the

Reasonableness allows for sustainable development, that through the precedent of the case law adheres to the decisions that have as their object similar matters and cases. The criticism of the system of the ISDS lies in the arbitral decisions that seem to be discordant and uncoordinated. It means that there is no international law that obliges the binding precedent. This position is confirmed by Art. 53 of the ICSID Convention, which states the award as binding for the parties.

The Statute of the ICJ is annexed by the Charter of the UN which states in art. 59, that the

“(...) decision of the court has no binding force except between the parties and in respect of that particular case (...)”.⁴²

The lack of binding precedent is reiterated in the ICSID award *SGS v. Philippines*, which states:

“(...) there is no doctrine of precedent in international law, if by precedent is meant a rule of the binding effect of

potential to be considered as expropriatory if there is a sufficient interference with the investor’s rights (...)”.

⁴²United Nations, Statute of the International Court of Justice, 26 June 1945 entry into force from 24 October 1945, 3 Bevens 1179; 59 Stat. 1031; T.S. 993; 39 AJIL Supp. 215 (1945).

a single decision (...) no hierarchy of international tribunals, and even if there were, there is no good reason for allowing the first tribunal in time to resolve issues for all later tribunals (...).⁴³

The conclusion regarding the complete irrelevance of precedent as a canon and as legal logic remains reductive. Arbitration practice witnesses a system based on precedent (Schill, 2009; Schill, 2017).⁴⁴

The parties and judges follow the decision regarding the precedents that support the legal reasoning. It is noted the El Paso v. Argentina case that highlights in practice that is “heavily relied on precedent” reiterating that it has no knowledge of the existence of an obligation to *stare decisis*.⁴⁵

⁴³SGS Société Générale de Surveillance S.A. v. Philippines, ICSID Case No. ARB/02/6. Decision of the tribunal on objections to jurisdiction, 29 January 2004, par. 97.

⁴⁴Schill affirmed that: “(...) arbitral tribunals actively produce coherent outcomes in their decision-making activity by relying increasingly on common law-type reasoning that takes into account, follows and/or distinguishes earlier investment awards and decisions (...)”.

⁴⁵El Paso Energy International Company v. Argentina, ICSID Case No. ARB/03/15, decision on jurisdiction of 27 April 2006, par. 39: “(...) ICSID arbitral tribunals are established *ad hoc*, from case to case, in the framework of the Washington Convention, and the present Tribunal

A step forward is made in the *Saipem v. Bangladesh* case in 2007. In it the arbitral tribunal did not bind the precedent that adopts the solution that establishes a series of consistent cases:

“(...) duty to adopt solutions established in a series of consistent cases (...) subject to compelling contrary grounds (...)”.

Thus, a legal logic is constructed for the harmonious development of investment law, according to which the

“(...) Tribunal considers that it is not bound by previous decisions (...) opinion that it must pay due consideration to earlier decisions of international tribunals (...) subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases (...) has a duty to seek to contribute to the harmonious development of investment law and thereby to meet the

knows of no provision, either in that Convention or in the BIT, establishing an obligation of *stare decisis* (...) a reasonable assumption that international arbitral tribunals, notably those established within the ICSID system, will generally take account of the precedents established by other arbitration organs, especially those set by other international tribunals (...). The Tribunal will follow the same line, especially since both parties, in their written pleadings and oral arguments, have heavily relied on precedent (...)”.

legitimate expectations of the community of states and investors towards certainty of the rule of law (...).⁴⁶

In 2005, in a separate opinion in the Thunderbird award, it was stated that the arbitrator must be respected. This logic is consolidated to the precedents as a “consistent line of reasoning” which is comparable with the character of the customary source motivating thus its own justification.⁴⁷

In the Burlington v. Ecuador case of 2010 the ICSID arbitral tribunal respected the considerations of the Saipem case, which specifies and takes into account the previous decisions which consolidate earlier decisions established in a series of consistent cases thus contributing to the

⁴⁶Saipem S.p.A. v. Bangladesh, ICSID Case No. ARB/05/07. Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007, par. 67.

⁴⁷International Thunderbird Gaming Corporation v. Mexico, UNCITRA, Separate Opinion of T.W. Wälde, 1 dicembre 2005, par. 16: “(...) individual arbitral awards by themselves do not as yet constitute a binding precedent, a consistent line of reasoning developing a principle and a particular interpretation of specific treaty obligations should be respected (...) an authoritative jurisprudence evolves, it will acquire the character of customary international law and must be respected. A deviation from well and firmly established jurisprudence requires an extensively reasoned justification (...)”.

harmonious development of international investment law.⁴⁸

A position obtained and repeated also in 2014 in the decision on the jurisdiction of the Churchill Mining v. Indonesia case where it is stated that:

“(...) the Tribunal considers that it is not bound by previous decisions. At the same time, it is of the opinion that it must pay due consideration to earlier decisions of international tribunals (...) subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases (...)”⁴⁹.

From the international trade law in the US-Stainless Steel case of 2008 the Appeal Chamber of WTO recognizes the

⁴⁸Burlington Resources Inc. v. Ecuador, ICSID Case No. ARB/08/5. Decision on Jurisdiction, 2 June 2010, par. 100: “(...) must pay due consideration to earlier decisions of international tribunals (...) subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases. It also believes that (...) has a duty to seek to contribute to the harmonious development of investment law, and thereby to meet the legitimate expectations of the community of states and investors towards the certainty of the rule of law (...)”.

⁴⁹Churchill Mining PLC and Planet Mining Pty Ltd v. Indonesia, ICSID Case No. ARB/12/14 and 12/40. Decision on Jurisdiction, 24 February 2014, par. 85.

value of the precedent which states:

“(...) absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case (...)”.⁵⁰

The precedent thus becomes a standard that derogates facts, situations that are new and lack reasoning. In other words, it is a judicial body that resolves a legal question for the next cases. Similar cases are decided in the same way that are similar and respect the precedent capable of bringing out a consolidated jurisprudence of the reasoning followed by the court.⁵¹

⁵⁰Appellate Body Report, United States-Final Anti-Dumping Measures on Stainless Steel from Mexico, WT/DS344/AB/R, of 20 May 2008, par. 160.

⁵¹Daimler Financial Services AG v. Argentina, ICSID Case No. ARB/05/1. Award, 22 August 2012, par. 52: “(...) Tribunal acknowledges that it is a fundamental principle of the rule of law that “like cases should be decided alike, unless a strong reason exists to distinguish the current case from previous ones.” This latter consideration will weigh more or less heavily depending upon: a) how “like” the prior and present cases are, having regard to all relevant considerations; b) the degree to which a clear jurisprudence constante has emerged in respect of a particular legal issue; and c) the Tribunal’s independent estimation of the persuasiveness of prior tribunals’ reasoning (...) will therefore have regard for the decisions of prior tribunals in accordance with these criteria (...)”.

It is also noted a study of 2017 on investment arbitration that refers to the precedent:

“(...) evidence shows that the regime has evolved into a tightly networked judicial system, through precedent-based practices (...)” (Stone Sweet, Grisel, 2017).

It is a “*stare decisis de facto*”, that takes into account a legal reasoning, that is followed by the courts and predictably guarantees the coherence of the awards. Undoubtedly the interpretation is constant and repeated over time acquiring authoritative character and constituting a form of interpretation, that is contrary to the canons of legal logic and good faith, according to Art. 31 VCLT.

The *stare decisis de facto* constitutes the entrance to sustainable development, that is based and interpreted on ILAs, including the protection of the environment, human rights, health as a guide for future decisions. Also, on similar cases to analogous matters strengthens the barriers of the protection of rights responsible for investments.

WHAT HAS THE ISDS PROCEDURAL SYSTEM INTRODUCED?

The evolution of international investment law through procedural rules for ISDS disputes is an entry point for sustainable development that makes the arbitration system transparent and often necessary. Transparency has to do with information that considers a practice of fulfillment of the SDG 16 that is also part of n. 10 of the declaration of Rio of 1992, as well as principles n. 5 (public participation) and n. 6 (good governance) of the relevant New Delhi Declaration of the ILA and of the Sofia Guiding Statement n. 7, which is considered as foundational to sustainable development.

It has also taken into consideration par. 43 of the final document entitled: The future we want of Rio +20.⁵² This is an introduction that includes the procedural rules of the IIAs. It highlights mechanisms of ISDS, as well as sustainable development that respects the principles of

⁵²Daimler Financial Services AG v. Argentina, ICSID Case No. ARB/05/1. Award, op. cit., par. 43: “(...) underscore that broad public participation and access to information and judicial and administrative proceedings are essential to the promotion of sustainable development (...)”.

legality, transparency, participation, accountability for the conduct of the investor that moves on to further development and analysis.

According to the example of UNCTAD, the resolutions of disputes are designed to produce just outcomes that also reflect key values, such as social ones. It is a decision-making process by judicial bodies that is inclusive and transparent in order to promote, according to n. 4 of Sofia Guiding Statement, the:

“(...) equity and fairness in exercising their judicial function (...)”.⁵³

LEGALITY CLAUSES AND CLEAN HANDS PRINCIPLE

The principle of clean hands is valued according to the importance of good faith at a procedural level for the parties. The investor is thus part of the ISDS clause

⁵³UNCTAD, Reforming investment dispute settlement: a stocktaking, IIA Issues Note, n.1, 2019, p. 4: “(...) investment dispute settlement system must be designed to produce just outcomes that are viewed as reflecting key societal values. Transparent and inclusive decision-making on reform as well as cross-fertilization and coordination between different processes, such as the 2030 agenda for sustainable development, are essential in this regard (...)”.

according to good faith without abusing the instrument that commits fraudulent acts, corruption and/or *contra legem* in the host state. For example, the ICSID Inceysa award includes good faith according to par. 230 of the supreme principle and to par. 231 stating the:

“(...) absence of deceit and artifice during the negotiation and execution of instruments that gave rise to the investment, as well as loyalty, truth and intent to maintain the equilibrium between the reciprocal performance of the parties (...)”.⁵⁴

The Phoenix award takes into account good faith as a general principle of the international law. This is an obligation of conduct, for the parties to a dispute that takes into account:

“(...) honestly and fairly with each other, to represent their motives and purposes truthfully, and to refrain from taking unfair advantage (...)”.⁵⁵

⁵⁴Inceysa Vallisoletana S.L. v. El Salvador, ICSID Case No. ARB/03/26. Award, 2 August 2006, par. 231.

⁵⁵Phoenix Action, Ltd. v. The Czech Republic, ICSID Case No. ARB/06/5. Award, 15 April 2009, par. 107 and 109: “(...) good faith has long been recognized in public international law, as it is also in all national legal systems (...) parties to deal honestly and fairly with each other, to represent their motives and purposes truthfully, and to

The *Sempra* award takes into consideration:

“(...) common guiding beacon that will orient the understanding and interpretation of obligations (...)”.⁵⁶

Thus, states do not offer access to the ISDS mechanism for investments that are made in bad faith. Indeed,

“(...) states cannot be deemed to offer access to the ICSID dispute settlement mechanism to investments not made in good faith (...)”.⁵⁷

The jurisdiction of equity in English law sustains:

“(...) who comes to arbitration, must come with clean hands (...)”.

refrain from taking unfair advantage (...) principle governs the relations between states, but also the legal rights and duties of those seeking to assert an international claim under a treaty (...). The Washington Convention as well as the BIT have to be construed with due regard to the international principle of good faith (...)”.

⁵⁶*Sempra Energy International v. Argentina*, ICSID Case No. ARB/02/16. Award, 28 September 2007, par. 297.

⁵⁷*Sempra Energy International v. Argentina*, ICSID Case No. ARB/02/16, op. cit., par. 106: “(...) States cannot be deemed to offer access to the ICSID dispute settlement mechanism to investments not made in good faith (...) international investment arbitration cannot be granted if such protection would run contrary to the general principles of international law, among which the principle of good faith is of utmost importance (...)”.

Clean hands makes the investor's conduct a condition of admissibility to the ISDS claim as well as a precise obligation for the applicant investor. The lack of compliance in good faith presents itself as a lack of jurisdiction since the arbitral tribunal refuses to protect the investor. Therefore, it has been highlighted that a:

“(...) most severe and efficient sanction for abusive investor conduct dismisses the request for arbitration for lack of jurisdiction (...)” (Scheu, 2017).

In *Hesham Talaat v. Indonesia* case the host state considers a convicted person for theft and corruption, money laundering, investment crimes for reasons that, according to para. 161:

“(...) he comes to this Tribunal with ‘unclean hands’ renders his claims inadmissible (...)”.

In this way, in para. 164 it is noted that the doctrine of clean hands is presented as a “procedural bar to his claims”. Therefore, according to par. 646 the arbitral tribunal considers that the doctrine of the clean hands:

“(...) renders the Claimant's claim inadmissible (...)” (Newcombe, Marcoux, 2015).⁵⁸

⁵⁸Hesham T. M. Al Warraq v. Indonesia, UNCITRAL. Award, 15 December 2014, par. 648, 683, 684.

Although it is not stated in the text of the IIAs, the inadmissibility of an appeal is obtained by interpretation, thus applying the clean hands doctrine. The judge does not grant the investor if he lacks serious behavior based on the principle of the *ex dolo malo non oritur actio* or *nemo auditur turpitudinem suam allegans*, that is, procedural corollaries for the doctrine of clean hands. For example, the Inceysa award states that:

“(...) foreign investor cannot seek to benefit from an investment effectuated by means of one or several illegal acts (...) enjoy the protection granted by the host state, such as access to international arbitration to resolve disputes, because it is evident that its act had a fraudulent origin and, as provided by the legal maxim, nobody can benefit from his own fraud (...)”.⁵⁹

This sanction is the result of the application of the principle of non-contradiction. The legal system allows those who have committed illicit, corrupt, fraudulent acts to benefit from them.⁶⁰

⁵⁹Inceysa Vallisoletana S.L. v. El Salvador, op. cit., par. 242.

⁶⁰Inceysa Vallisoletana S.L. v. El Salvador, op. cit., parr. 240, 243, 244: “(...) Inceysa acted improperly in order to be awarded the bid that made its investment possible and, therefore, it cannot be given the

The ICSID award in the *Hamester v. Ghana* at par. 124 states the:

“(...) general principles that exist independently of specific language to this effect in the Treaty (...)”.⁶¹

The majority of the IIAs highlight two conditions of admissibility for the investor. The latter has the burden of respecting and activating the arbitration procedure, which is based on the rule of good faith. This is a condition, which through a prior attempt, composes the rule of good faith. A first condition consists of the attempt to settle the dispute

protection granted by the BIT. Sustaining the contrary would be to violate the aforementioned general principles of law (...) Inceysa to benefit from an investment made clearly in violation of the rules of the bid in which it originated would be a serious failure of the justice that this Tribunal is obligated to render. No legal system based on rational grounds allows the party that committed a chain of clearly illegal acts to benefit from them (...)”.

⁶¹Gustav F W Hamester GmbH & Co KG v. Ghana. ICSID Case No. ARB/07/24. Award, 18 June 2010, par. 123: “(...) investment will not be protected if it has been created in violation of national or international principles of good faith; by way of corruption, fraud, or deceitful conduct; or if its creation itself constitutes a misuse of the system of international investment protection under the ICSID Convention (...) also not be protected if it is made in violation of the host state’s law (...)”.

with the host state (“amicable settlement”)⁶² and a second that respects the laws (“legality clause”). Respecting the laws imposes protection and at the same time denies the remedy of the ISDS thus realizing the investment for violation of the laws of the host state as unlawful conduct thus committing acts of corruption⁶³ and trampling on fundamental rights.

According to the procedural basis of the *nemo auditur turpitudinem suam allegans* the request for arbitration is declared inadmissible without entering into the substance of the dispute. In the case in question, with regard to the decision on costs, the arbitral tribunal noted that the appellants had long remained silent and had delayed communicating to the arbitrators.

⁶²See case: Biwater Gauff in par. 343 “(...) this six-month period is procedural and directory in nature, rather than jurisdictional and mandatory. [...] Non-compliance with the six month period, therefore, does not preclude this Arbitral Tribunal from proceeding (...)”.

⁶³ICSID Case No. ARB(AF)/07/01 Piero Foresti, Laura de Carli & Others v. South Africa. Award, 4 August 2010, par. 120: “(...) Tribunal cannot properly order that the costs of a Party’s adviser who engages in the solicitation of bribes should be recovered from the other Party (...)”.

An attempt at bribery during the negotiation between the parties of the dispute, where the legal team defended South Africa, arose from an envelope for itself and in exchange for its assistance, thus convincing the South African government to accept the waiver of a dispute.

The arbitration tribunal appreciated the behavior of South Africa and quantified the request for the refund of the costs, thus removing the sum for emoluments relating to the accused lawyer. The court decided to apply the principle of good faith without allowing a valid in law and the basis of immorality without being able to recognize the emoluments and stains arising from corrupt acts.

On the other hand, the legality clause passes into the BITs. The related doctrine of the clean hands as a form of legality for the investment is in “accordance with the laws of the host state”, which is widespread in modern BITs (Liakopoulos, 2019).⁶⁴ It is a clause that protects and takes

⁶⁴Tokios Tokelés v. Ukraine, ICSID Case No. ARB/02/18, Decision on Jurisdiction, 29 April 2004, par. 84: “(...) requirement in Article 1(1) of the Ukraine-Lithuania BIT that investments be made in compliance with the laws and regulations of the host state is a common requirement in modern BITs (...)”.

into account the IIAs as a conduct that considers the investor and the obligation to respect national laws at an international level according to the Investment Policy Framework of the UNCTAD of 2015. It is an umbrella clause that operates in the opposite way (Tanzi, 2018) recognizing the related legality requirements as:

“(...) essentially domestic law obligations of the foreign investor are somehow internationalized (...)” (De Brabandere, 2019).⁶⁵

⁶⁵De Brabandere declared that: “(...) is a recent tendency in investment agreement to add so-called “legality requirements” which imply an obligation for foreign investors to conform to and respect the domestic laws of the host state-including the applicable human rights obligations (...) such clause is added in an investment agreement, the essentially domestic law obligations of the foreign investor are somehow “internationalized” in the sense that the non-respect of the obligations in respect of human rights under domestic law may-dependending on the precise formulation of the treaty-impact the admissibility of claims based on the treaty, or the existence, for the purposes of the treaty, of a covered investment (...) requirements as such do not contain any obligations on the part of the foreign investor -human rights obligations or other- which could form the basis of a claim from the host state against the investor (...)”. The award: ICSID Urbaser affirmed that: “(...) Article I(2) of the BIT, when requesting that an investment must be acquired or effected in accordance with the

The requirement of legality varies and operates in two specific ways, namely through the insertion of a clause and through the IIA, which provides a protected investment. In this way, investments are considered to be made according to the laws of the host state.⁶⁶ This is an example that finds space in Art. 8.1 of the CETA. It defines the covered investment as it is made in accordance with the legislation that is applicable at the time it is made.

The principle of good faith, according to Art. 8.18.3. CETA, allows the investor to file a claim even if the investment is made through deception, concealment, corruption, etc. and reading art. 8.1. together with art. 8.18.3 (Bungenberg, Reinisch, 2022; Galanis, 2023).

The burden of conduct for the investor is highlighted, thus sanctioning the prohibition of access to the remedy of ISDS

legislation of the country receiving the investment, relates to the definition of investments for the purposes of determining the scope of application of the BIT (...) an investor's obligation to comply with the host state's legislation when pursuing its investment with the effect that the host state would have a right to trigger the application of the BIT and its arbitration clause in case of a violation of its domestic law (...)"

⁶⁶Inceysa Vallisoletana S.L. v. El Salvador, op. cit., parr. 185-6.

(Bernasconi, Ostwewalder, Mann, 2019).⁶⁷ The lack of a definition of investment as *secundum legem* leads to the conclusion of an interpretation that is based on Art. 25 of the ICSID Convention, which does not contain a definition of investment that uses the open formula of

“(...) legal dispute arising directly out of an investment
(...)”.

The arbitral jurisprudence that comes from the ICSID tribunals has highlighted and identified some elements *in comunis* such as for example the duration, the risk and the contribution to the economic development of the host state

⁶⁷Bernasconi-Osterwalder, Mann affirmed that: “(...) analysis of CETA (...) highlights the complete absence of investor obligations here, with one exception (...) clarify the implications of the obligation of investors to make their investments in accordance with the law of the host state (...) consequence is that the investor is barred from access to investor-state dispute settlement as an enforcement mechanism. This is a first such direct expression that we are aware of. In an IIA of an obligation on investors to make the investments in accordance with the relevant law, and a mechanism for enforcing it (...) it must be noted that the obligations only come into play when an investor brings a claim against the host state. The host state can then respond with a defense and argue that the tribunal does not have jurisdiction in those limited instances (...)”.

in a systematic way in the preamble of the ICSID Convention, which speaks and refers to an “international cooperation for economic development”.⁶⁸

Investments are protected with effective presence of the host state economy. It excludes situations of fictitious

⁶⁸Salini Costruttori S.p.A. and Italstrade S.p.A. v. Morocco, ICSID Case No. ARB/00/4, decision on jurisdiction, 16 July 2001, par. 52: “(...) [ICSID] Convention’s preamble, one may add the contribution to the economic development of the host state of the investment as an additional condition (...)”. See also the case: L.E.S.I. S.p.A. and Astaldi S.p.A. v. Algeria, ICSID Case No. ARB/05/3, Décision, 12 July 2006, par. 72: “(...) Il ne paraît en revanche pas nécessaire qu’il [un investissement] réponde en plus spécialement à la promotion économique du pays, une condition de toute façon difficile à établir et implicitement couverte par les trois éléments retenus (...)”. See also in argument: Mr. Patrick Mitchell v. Democratic Republic of the Congo, ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award, 1st November 2006, par. 33: “(...) *ad hoc* Committee wishes nevertheless to specify that, in its view, the existence of a contribution to the economic development of the host state as an essential-although not sufficient-characteristic or unquestionable criterion of the investment, does not mean that this contribution (...) operation to contribute in one way or another to the economic development of the host state, and this concept of economic development is, in any event, extremely broad but also variable depending on the case” must always be sizable or successful; and, of course, ICSID tribunals do not

nature that are devoid of local production. The criteria, as elements that come from the Salini award support the need for sustainable investments (Sauvant, 2019). They also consider and protect those that violate human rights, through acts of corruption, that do not contribute to the economic development of the host state (scheu, 2017).⁶⁹ The Phoenix award of 2009 tried to develop the definition of investment by also adding some other important elements that are part of the salini test such as those of legality and good faith. According to par. 114

“(...) 5-assets invested in accordance with the laws of the host state; 6-assets invested *bona fide* (...)”.

The Phoenix award highlights the legality of each BIT in the absence of an express provision.⁷⁰ It refers to the Plama v.

have to evaluate the real contribution of the operation in question (...)”.

⁶⁹Scheu affirmed that: “(...) arbitrators should come to the conclusion that when the violation of relevant human rights has such a strong negative indicative effect, the project in dispute cannot be characterized as an investment (...)”.

⁷⁰Phoenix Action, Ltd. v. The Czech Republic, ICSID Case No. ARB/06/5. Award, 15 April 2009, par. 101: “(...) the Tribunal’s view, states cannot be deemed to offer access to the ICSID dispute settlement mechanism to investments made in violation of their laws (...) it is the Tribunal’s view that this condition -the conformity of the establishment of the investment

Bulgaria award of 2008, which is related to the appeal based on the ECT. The silence of the charter of energy does not contain a legality clause for investment. It does not prevent the arbitral tribunal from considering such a requirement present.⁷¹

Effectively the Phoenix award states in par. 102 that:

“(...) core lesson is that the purpose of the international protection through ICSID arbitration cannot be granted to investments that are made contrary to law (...)”.

with the national laws- is implicit even when not expressly stated in the relevant BIT (...) purpose of the international mechanism of protection of investment through ICSID arbitration cannot be to protect investments made in violation of the laws of the host state or investments not made in good faith, obtained for example through misrepresentations, concealments or corruption, or amounting to an abuse of the international ICSID arbitration system (...) purpose of international protection is to protect legal and *bona fide* investments (...)”.

⁷¹Plama Consortium Limited v. Bulgaria, ICSID Case No. ARB/03/24. Award, 27 August 2008, par. 139: “(...) ETC does not contain a provision requiring the conformity of the Investment with a particular law. This does not mean, however, that the protections provided for by the ECT cover all kinds of investments, including those contrary to domestic or international law (...) Arbitral Tribunal concludes that the substantive protections of the ECT cannot apply to investments that are made contrary to law (...)”.

The Phoenix award entails a broad definition of investment that makes good faith a legality requirement. It is an opportunity for a new concept that defines investment as an entry point for sustainable development. The definition of investment has been referred to and is part of the 2016 Nigeria-Morocco BIT, as a requirement that contributes to sustainable development linked to the requirement to contribute to the sustainable development of the host state.⁷²

The 2013 Metal-Tech v. Uzbekistan case considered the positions of the Phoenix and of the host state. It argued that the requirement of legality was inherent and implicit in all BITs as it

⁷²Plama Consortium Limited v. Bulgaria, ICSID Case No. ARB/03/24, op. cit., art.1: “(...) Investment means an enterprise within the territory of one state established, acquired, expanded or operated, in good faith, by an investor of the other state in accordance with law of the Party in whose territory the investment is made taken together with the asset of the enterprise which contribute sustainable development of that Party and has the characteristics of an investment involving a commitment of capital or other similar resources, pending profit, risk-taking and certain duration (...)”.

“(…) contains a legality clause (…) significant misconduct directly related to its investment (…”,
 which is committed by the investor in the case of corruption rendering thus the related appeal inadmissible (Liakopoulos, 2019).⁷³
 International treaties have reviewed the international treaties and the fight against corruption. In this regard, the arbitral tribunal has declared the related lack of jurisdiction (Salacuse, 2021).⁷⁴

⁷³Metal-Tech Ltd. v. Uzbekistan, ICSID Case No. ARB/10/3. Award, 4 October 2013, par. 110: “(…) requirement that investments must be made in accordance with the host state’s law is implied in BITs, [...] irrespective whether they contain a legality clause or not (…) the claims should be dismissed because they are inadmissible on account of the Claimant’s unlawful conduct (…) “clean hands” doctrine, the Claimant should not be allowed to pursue its claims because it has engaged in significant misconduct directly related to its investment (…) by promising to pay several individuals to obtain or influence the Government’s approval of its investment project, the Claimant violated Uzbek laws on bribery as well as transnational principles and international public policy prohibiting corruption (…)”.

⁷⁴Metal-Tech Ltd. v. Uzbekistan, op. cit., , par. 373: “(…) Uzbekistan’s consent to ICSID arbitration, as expressed in Article 8(1) of the BIT, is restricted to disputes “concerning an investment” Article 1(1) of the BIT defines investments to mean only investments implemented in

The reconstruction of legality is also noticeable from 2006 to the Inceysa and World Duty Free awards. The concept of international public policy/transnational and the superior norms of a conduct that preserves the relative values to an international legal system are defined according to par. 139:

“(...) international consensus as to universal standards and accepted norms of conduct that must be applied in all fora (...)”.⁷⁵

In particular, in the World Duty Free case the investing company was accused of related acts of corruption (Sacerdoti, 2009; Menaker, 2010; Partasides, 2010; Miles, 2012; Lloamzon, 2014; Inan, 2018; Bao, 2018; Bulovsky, 2019; Greenwald, Ivers, 2019; Devendra, 2019). It took the form of a bribe from the then President of the Republic of Kenya to obtain the management of Duty Free shops at the airports of Nairobi and Mombasa.

compliance with local law (...) present dispute does not come within the reach of Article 8(1) and is not covered by Uzbekistan’s consent (...) failing consent by the host state under the BIT and the ICSID Convention, this Tribunal lacks jurisdiction over this dispute (...)”.

⁷⁵World Duty Free Company Ltd. v. Kenya , ICSID Case No. ARB/00/7, Award, 25 September 2006, par. 143-145.

The arbitral tribunal declared the appeal inadmissible. According to par. 157 stated that:

“(...) contrary to international public policy of most, if not all, states or, to use another formula, to transnational public policy (...) claims based on contracts of corruption or on contracts obtained by corruption cannot be upheld by this Arbitral Tribunal (...)”.

The lack of jurisdiction is explained as follows according to par. 179 that:

“(...) Claimant is not legally entitled to maintain any of his pleaded claims in these proceedings on the ground of *ex turpi causa non oritur actio* (...)”.

On the same topic but not very precise is the award in *Inceysa v. El Salvador* case, which reached the proof of a series of fraudulent acts for falsified documents by the Spanish company of the appellant. It awarded the investment in El Salvador, a chain of workshops and of related stations for the control of polluting gas emissions in motor vehicles. In this regard, the award specified that:

“(...) international public policy consists of a series of fundamental principles that constitute the very essence of the state, and its essential function is to preserve the values of the international legal system against actions

contrary to it (...).⁷⁶

The clause that reads “in accordance with the law” in the various BITs shows the manifestation of an international public policy, which shows the intention for the states to exclude the protection that is offered by an arbitration remedy for investments *contra legem*.⁷⁷

The award thus considers that public policy is a provision of a “meta-positive provision” nature, which seeks to unite the general principle of law with an ethical obligation of conduct and as it is specified:

“(...) any claim of an investor (...) is a meta-positive provision that prohibits attributing effects to an act done illegally (...).⁷⁸

⁷⁶Inceysa Vallisoletana S.L. v. El Salvador, ICSID Case No. ARB/03/26, Award, 2 August 2006, par. 245.

⁷⁷Inceysa Vallisoletana S.L. v. El Salvador, op. cit., par. 246 “ (...) inclusion of the clause ‘in accordance with law’ in various BIT provisions is a clear manifestation of said international public policy (...) clear and obvious intent of the signatory states to exclude from its protection investments made in violation of the internal laws of each of them (...).”

⁷⁸Inceysa Vallisoletana S.L. v. El Salvador, op. cit., par. 248: “(...) uncontroversial that respect for the law is a matter of public policy not only in El Salvador, but in any civilized country (...) declares itself competent to hear the disputes between the parties, it would

Par. 252, also, does

“(...) not exclude Inceysa’s investment from the protection of the BIT (...) it would be a violation of international public policy, which this Tribunal cannot allow (...) that Inceysa’s investment is not protected by the BIT because it is contrary to international public policy (...)”.⁷⁹

The relevant reference to international public policy is also taken in the relevant award *Plama v. Bulgaria*. In it, due to fraudulent declarations investments in the energy sector, such as oil refineries, are obtained and the lack of jurisdiction and the condemnation of the investor for the related payment of costs in the procedure that goes beyond the counterparty refund reaches approximately 8 million

completely ignore the fact that, above any claim of an investor, there is a meta-positive provision that prohibits attributing effects to an act done illegally (...) not possible to recognize the existence of rights arising from illegal acts, because it would violate the respect for the law which, as already indicated, is a principle of international public policy (...)”.

⁷⁹*Inceysa Vallisoletana S.L. v. El Salvador*, op. cit., par. 239: “(...) falsifying the facts, Inceysa violated the principle of good faith from the time it made its investment and, therefore, it did not make it in accordance with Salvadoran law. Faced with this situation, this Tribunal can only declare its incompetence to hear Inceysa’s complaint, since its investment cannot benefit from the protection of the BIT (...)”.

USD.⁸⁰

In the *Fraport v. Philippines* case, the German airport investor complained of corruption and fraud by Philippine public officials as well as by controlling shareholders of the local company itself: PIATCO, which was awarded the contract for the related construction and management of a new terminal at Manila International Airport. The award considers as evident (*res ipsa loquitur*) the evidence that is collected for the “egregious behaviour”, held by the investor, i.e. by a series of corrupt acts that conclude the

⁸⁰*Plama Consortium Limited v. Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008, par. 143: “(...) Tribunal has decided that the investment was obtained by deceitful conduct that is in violation of Bulgarian law (...) is of the view that granting the ECT’s protections to Claimant’s investment would be contrary to the principle *nemo auditur propriam turpitudinem allegans* invoked above. It would also be contrary to the basic notion of international public policy—that a contract obtained by wrongful means (fraudulent misrepresentation) should not be enforced by a tribunal (...)”. In par. 325 it was affirmed that: “(...) Claimant is not entitled to any of the substantive protections afforded by the ECT (...) Claimant bears all fees and expenses of the Arbitral Tribunal as well as ICSID’s administrative charges, being USD 919,985 (...) Claimant is ordered to pay Respondent USD 460,000 on account of Respondent’s advance on costs as well as USD 7,000,000 on account of Respondent’s legal fees and other costs (...)”.

jurisdiction. In par. 401, it stated that

“there is no investment in accordance with law. This means that the Tribunal lacks jurisdiction *ratione materiae* (...)”.⁸¹

In other arbitration awards, corruption justifies the

⁸¹Fraport AG Frankfurt Airport Services Worldwide v. Philippines, ICSID Case No. ARB/03/25, Award, 16 August 2007, par. 4: “(...) Respondent has alleged that the Claimant made its investment in violation of the laws of the Philippines, in particular foreign ownership and control legislation known as the Anti-Dummy Law (the ADL) (...) Respondent has also made allegations of fraud and corruption on the part of PIATCO shareholders, including the Claimant, as well as on the part of various Philippine public officials (...) PIATCO’s controlling shareholder took ‘kickbacks’ and received ‘under-the-table’ payments (...) comportment of the foreign investor, as is clear from its own records, was egregious and cannot benefit from presumptions which might ordinarily operate in favour of the investor (...) assuming (...) preponderance of evidence test which applies in civil law must yield in the instant case to a beyond a reasonable doubt’ test because the subject of the in accordance inquiry is a Philippine criminal statute, this is a case in which *res ipsa loquitur* (...) all of which are found in Fraport’s own documents, are incontrovertible (...) Fraport knowingly and intentionally circumvented the ADL by means of secret shareholder agreements. As a consequence, it cannot claim to have made an investment in accordance with law (...) declare that the Centre does not have jurisdiction to hear this dispute (...)”.

invalidity of a contract⁸² resulted in the reduction of the liquidation of costs borne by the parties in dispute.⁸³

The clean hands doctrine required good faith behavior by the parties considering the claims as unfounded and/or based on frivolous claims. CETA thus allows the defendant to raise an exception which shows, according to art. 8.32, the claimant's claim as legally unfounded. According to art. 8.33 the claim is legally unfounded when the tribunal issues a reasoned decision (Nyer, 2015; Pantaleo, 2017; Dionysiou,

⁸²Wena Hotels Ltd. v. Egypt, ICSID Case No. ARB/98/4. Decision of 5 February 2002, par. 47: “The Applicant (...) invokes three specific areas in which the Tribunal exceeded its powers as a consequence of not applying Egyptian law (...) validity of the leases in connection with an alleged incident of corruption or conflict of interest in the person of Mr. Kandil who was consulting Wena (Wena Hotels Limited) (...) acted also as Chairman of EHC (...) improper influence can invalidate the lease agreements under Egyptian law, or for the matter of corruption also under international law, such unlawful act has to be proved. The Tribunal did not consider that there was sufficient evidence to prove such a claim (...)”.

⁸³See from the ICSID: Foresti v. Sudafrica, par. 133: “(...) cannot properly order that the costs of a Party’s adviser who engages in the solicitation of bribes should be recovered from the other Party (...)”.

2021).⁸⁴

Similarly, the IPA EU-Singapore claims, according to art. 3.14 and art. 3.15, are legally unfounded. The IPA EU-Vietnam are exceptions of manifest unfoundedness, according to art. 3.44 and art. 3.45.

This is an arbitration rule that is based on Art. 41.6 of the ICSID, which is related to the preliminary objections that consider that the “claim is manifestly without legal merit”. It is recalled Art. 35, par. 3 of the European Convention of Human Rights, which declares as inadmissible any individual objection that is incompatible with the provisions of the convention and its protocols.

⁸⁴Nyer affirmed that: “(...) explicit adoption by CETA of the “loser pays” principle is, to the author’s knowledge, unique in investment treaties. The principle may further deter frivolous claims. In contrast to commercial arbitration proceedings, the traditional approach in investment arbitration has been for each party to bear its own costs of legal representation. While costs awards are becoming more frequent, there has been a perception that such orders are rarely made against unsuccessful claimants and in favor of respondent states (...)”. Pantalreo declared that: “(...) [a]rticle 8.39 CETA [...] it adopts the ‘loser pays’ maxim as a general principle for the allocation of costs, thus reducing the risk of vexatious litigation (...)”.

The conduct of the investor finds in the ICSID Azinian case denial since it rejects the appeal to the investors, namely the American citizens who have concealed the state of bankruptcy in the company that awards a contract in Mexico.⁸⁵

In 2009 ICSID cases, namely Europe Cement⁸⁶ and Cementownia,⁸⁷ the plea for abuse of process is falsely and deceptively portrayed to the foreign investor, who aims to obtain lucrative compensation by abusing international arbitration. It is affirmed, in this regard, that the:

⁸⁵Robert Azinian, Kenneth Davitian, & Ellen Baca v. Mexico, ICSID Case No. ARB (AF)/97/2. Award, 1st November 1999, par. 31: “(...) authorities thus entrusted a public service to foreign individuals whom they were falsely led to believe were part of an experienced concern possessed of financial and technological resources adequate for the job (...)” and in par. 128: “(...) Claimants obviously cannot legitimately defend themselves by saying that the Ayuntamiento should not have believed statements that were so unreasonably optimistic as to be fraudulent”, par. 108), decided in favour of the host state (...)”.

⁸⁶Europe Cement Investment & Trade S.A. v. Turkey, ICSID Case No. ARB(AF)/07/2. Award, 13 August 2009.

⁸⁷Cementownia ‘Nowa Huta’ S.A. v. Turkey, ICSID Case No. ARB(AF)/06/2. Award, 17 September 2009.

“(...) Claimant has intentionally and in bad faith abused the arbitration; it purported to be an investor when it knew that this was not the case (...)”⁸⁸.

Arbitration tribunals may reject a specific provision for the IIAs. In the case of corruption, the claims are specious and invoke the doctrine of the clean hands as the general

⁸⁸Cementownia ‘Nowa Huta’ S.A. v. Turkey, op. cit., par. 154, 158: “(...) Claimant is manifestly responsible for several procedural incidents: - It has filed a Request for Arbitration under an important international treaty framework and pursued it for two and a half years without being an investor (...) -The arbitration proceeding and its schedule have been considerably delayed upon several requests of the Claimant (...) - Meanwhile, Cementownia has sold virtually all of its operating assets and has gone out of business (...) Arbitral Tribunal is of the opinion that the Claimant has intentionally and in bad faith abused the arbitration; it purported to be an investor when it knew that this was not the case (...) abuse of process. In addition, the Claimant is guilty of procedural misconduct: once the arbitration proceeding was commenced, it has caused excessive delays and thereby increased the costs of the arbitration (...) -Turkish nationals have used Cementownia as an instrument of fraud and abuse of process (...) -Cementownia is only one part of the Uzan’s family’s illicit effort to use foreign corporate vehicles to assert baseless claims before a variety of international tribunals (...) Arbitral Tribunal therefore agrees with the Respondent that Cementownia is now an empty shell the purpose of which was to pursue this arbitral proceeding without any exposure to an award of

principle of good faith. The form of interpretation of the IIAs takes into account the foreign investor (Viñuales, 2017).⁸⁹

THE *AMICUS CURIAE* CASE

Introducing sustainable development into ISDS procedures is a reality that puts into practice the procedural instrument of third-party participation through written petitions, which are part of the *amicus curiae*. From a procedural point of view, these are the parties, who are not part of a case but voluntarily offer useful information for the judge of fact and law. They assist in the decision impartially, avoiding errors. The related *amicus curiae* petitions have:

“(...) a particular knowledge or insight that is different

costs (...)”.

⁸⁹Viñuales declared that: “(...) change of mindset is necessary: one in which reliance on investment treaties is of course preserved but as part of a wider array of sources of foreign investment regulation; and one in which these different sources, including treaties, are interpreted in a more balanced manner, taking into account the degree of diligence displayed by foreign investors (...)”.

from that of the disputing parties (...)”.⁹⁰

They allow the judge to know the related issues for sustainable development that affect the foreign investment, i.e. human rights, environmental protection, rights relating to indigent peoples, etc., that stigmatize the conduct held by the investor, thus highlighting his responsibility. This is a tool that has substantial implications in the procedural dynamics of ISDS because it creates spaces for participation and forms that involve a civil society in an international arbitration (Cotula, 2017).⁹¹ The *amicus curiae* ensures transparency and participates in *state decisions*, that are corollaries of principles 1, 10, 22 of the Rio Declaration as well as of its own targets included in 16.6 and 16.7 of SDG 16 (Cotula, 2016). It is worth remembering the *Biwater v. Tanzania* case⁹² where the *amicus curiae* consists of five NGOs.

⁹⁰Glamis Gold, Ltd. v. USA, UNCITRAL. Award, 8 June 2009, par. 286.

⁹¹Cotula affirmed that: “(...) investment regime has created new spaces for citizen engagement at the international level (...) growing body of *amicus curiae* submissions shows that these international processes provide some opportunities for citizen engagement (...)”.

⁹²Biwater Gauff (Tanzania) Ltd. v. Tanzania, ICSID case No. ARB/05/22. Award, 24 July 2008.

The IISD-International Institute for Sustainable Development introduced the topic of sustainable development for the human right to water.⁹³ The investing company denied the related concerns that according to par. 357:

“(...) environmental issues arise for determination in this case and that the arbitration raises no issues of sustainable development (...)”,

so the court considered that it needs the relative contribution of the *amicus curiae* at “all relevant standpoints” and to issues that are relevant for the community. In this regard, we recall the language of the Methanex v. USA award of 2001 which stated in par. 358:

“(...) there is an undoubtedly public interest in this arbitration (...) extend far beyond those raised by the usual transnational arbitration between commercial parties (...) a broader argument (...) arbitral process could benefit from being perceived as more open or transparent; or conversely be harmed if seen as unduly

⁹³Biwater Gauff (Tanzania) Ltd. v. Tanzania, ICSID case No. ARB/05/22. Award, op. cit., par. 379: “(...) given the nature of the Project, the issue of investor responsibility in this case must be assessed in the context of sustainable development and human rights (...)”.

secretive (...)”.⁹⁴

The *amicus curiae* entered into international investment law through the *Methanex v. USA* case. For the first time the court accepted the petition filed by NGOs, who were concerned about:

“(...) proceedings perceived to be transparent rather than secretive (...)”.⁹⁵

In this regard, a petition was accepted in 2005 by ICSID in the *Suez v. Argentina* case. Its motivation was inspired by the need for transparency and openness to public opinion regarding the functioning of ICSID stating that:

⁹⁴*Biwater Gauff (Tanzania) Ltd. v. Tanzania*, ICSID case No. ARB/05/22. Award, op. cit., par. 358: “(...) Arbitral Tribunal did not accept BGT’s [Biwater Gauff (Tanzania) Limited] position (...) not inappropriate that the arbitral process permit some participation of interested non-disputing parties. It was also important that the Arbitral Tribunal be provided with information and submissions on the issues in dispute from all relevant standpoints. To this end, the Arbitral Tribunal respectfully adopted the words of the Arbitral Tribunal in *Methanex v. United States of America* (...)”.

⁹⁵*Methanex Corporation v. United States of America*, Decision of the Tribunal on Petitions from Third Persons to Intervene as ‘*amici curiae*’, 15 January 2001, parr. 52-53.

“(...) public acceptance of the legitimacy of international arbitral processes (...) strengthened by increased openness and increased knowledge as to how these processes function (...)”⁹⁶.

The institutionalization of the *amicus curiae* was introduced by Art. 37, par. 2 of the arbitration rules.⁹⁷ An article which

⁹⁶Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentina, ICSID Case No. ARB/03/19. Order in response to a petition for participation as *amicus curiae*, 19 May 2005, par. 22: “(...) acceptance of amicus submissions would have the additional desirable consequence of increasing the transparency of investor-state arbitration. Public acceptance of the legitimacy of international arbitral processes, particularly when they involve states and matters of public interest, is strengthened by increased openness and increased knowledge as to how these processes function (...) imperative that has led to increased transparency in the arbitral processes of the World Trade Organization and the North American Free Trade Agreement. Through the participation of appropriate representatives of civil society in appropriate cases, the public will gain increased understanding of ICSID processes (...) purpose of *amicus curiae* submissions is to help the Tribunal arrive at a correct decision by providing it with arguments, expertise, and perspectives that the parties may not have provided (...)”. Aguas del Tunari, S.A. v. Bolivia, ICSID Case No. ARB/02/3, Decision on Respondent’s Objections to Jurisdiction, 21 October 2005, parr. 16-18.

⁹⁷Aguas del Tunari, S.A. v. Bolivia, ICSID Case No. ARB/02/3, Decision on Respondent’s Objections to Jurisdiction, op. cit., “(...) art. 37(2) (...) file a

among others included requirements such as the contribution offered by the *amicus curiae*, which should be:

“1)(...) *utiliter datum*, providing the court with useful elements of fact and law; 2) innovative, bringing a *quid novi* that respects the relative content in its own case documents and as stated: “(...) particular knowledge or insight that is different from that of the disputing parties (...)”; 3) relating to the subject matter of the case and as stated: “(...) a matter within the scope of the dispute (...)”; 4) connected with an important interest in the proceeding, which acts and coincides with the higher public interest; 5) independent, as a third position outside the parties in the dispute, i.e. “(...) unduly burden or unfairly prejudice either party (...)””.

The arbitral tribunal held so and consulted the parties, who admitted the role of the *amicus curiae* after the relative consultation⁹⁸ with a final decision that leaves its discretion

written submission (...) may allow other persons, besides the parties (...) either party objects (...)”.

⁹⁸Art. 37(2) of the Rules of ICSID affirmed that: “(...) consulting both parties, the Tribunal may allow a person or entity that is not a party to the dispute (in this Rule called the “*non-disputing party*”) to file a written submission with the Tribunal regarding a matter within the scope of the dispute (...) to allow such a filing, the Tribunal shall consider, among other things, the extent to which: (a) the non-disputing party

of an assent to its own parties (Manjiao, 2017).

In 2013, the relevant UNCITRAL Rules on Transparency provided, according to art. 4, for any participation of the *amicus curiae* through the relevant writings, which stated that is “a matter within the scope of the dispute”.

The instrument of the *amicus curiae* seems to be a codified object which remains in fact in every provision thus obliging the arbitral tribunals to accept and take into consideration the objectives of a decision relating to the observations that are formulated by it (Cotula, 2017).⁹⁹ It is

submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties; (b) the non-disputing party submission would address a matter within the scope of the dispute; (c) the non-disputing party has a significant interest in the proceeding (...) ensure that the non-disputing party submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party, and that both parties are given an opportunity to present their observations on the non-disputing party submission (...).”

⁹⁹Cotula affirmed that: “(...) arbitral tribunals enjoy considerable discretion in deciding whether to accept *amicus curiae* submissions, and what use, if any, to make of the arguments contained therein. Further, there is no systematic evidence of the difference (...) the submissions make to the

worth remembering the *Pac Rim v. El Salvador* case. In this case the host state revoked a mining concession due to an impact on the environment and on water resources in the affected area.

The arbitral tribunal thus attached in writing the opinion of the *amicus curiae*, namely CIEL, Center for International Environmental Law. The

“(...) Tribunal’s decision in this award do not require the Tribunal specifically to consider the legal case advanced by CIEL (...) it would be inappropriate for the Tribunal to do so (...)”.¹⁰⁰

Another case that excludes the *amicus curiae* as part of the ICSID tribunal is the related *Border Timbers v. Zimbabwe* in 2012 (Greenberg, 2016).¹⁰¹ The participation of the NGO

outcomes of arbitration (...)”.

¹⁰⁰*Pac Rim Cayman LLC v. El Salvador*, ICSID Case No. ARB/09/12. Award, 14 October 2016, par. 3.30.

¹⁰¹*Bernhard von Pezold and Others v. Zimbabwe*, ICSID Case No. ARB/10/15. Award, 28 July 2015. *Micula v. Romania* (Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility, 24 September 2008), par. 166: “(...) ICSID Convention, a tribunal has the power to order pecuniary or non-pecuniary remedies, including restitution, i.e., re-establishing the situation which existed

European Center for Constitutional and Human Rights (ECCHR) as well as the four indigenous communities that came from the Chikukwa, Ngorima, Chinyai and Nyaruwa peoples, claimed the occupation of the ancestral lands.

The considerations were of a substantive nature and the arbitral tribunal upheld the non-context of international investment law with respect to human rights, while from the procedural point of view the requirements of independence, impartiality and third party status were based on the *amicus curiae* (Euler, Gehring, Scherer, 2015).

In 2010, the Foresti case was noted, which set a precedent for the participation of third parties, who were outside the disputing parties, in arbitration, as well as the introduction of innovative procedural formulas.¹⁰² The submission of written observations is assured by the court.

The accessed documents show how an enabler factor that allows third parties to provide information has as its final objective adequate knowledge of the state of the documents. According to par. 28 of the award, it was stated

before a wrongful act was committed (...)"

¹⁰²Piero Foresti, Laura de Carli & Others v. South Africa, ICSID Case No. ARB(AF)/07/01. Award, 4 August 2010.

that:

“(...) NDP participation is intended to enable NDPs to give useful information (...)”.

The *amicus curiae* procedure in the era of ICSID decisions tested some cases that according to par. 29 have shown: “the novelty of the NDP procedure”. The relevant arbitration panel introduced measures in favor of the NDPs. Thus, it was required that the parties to the third parties of the NDPs and the related comments on the fairness and effectiveness of the procedures are adopted (Whitsitt, 2009).

The arbitral tribunal was committed to include a section for the final decision, which also reproduced the opinions that were expressed with fairness and effectiveness in the relevant participation of the NDPs as well as on the related lessons learned that they could obtain.¹⁰³

¹⁰³In par. 28 affirmed that: “(...) where there is NDP participation, the Tribunal must ensure that it is both effective and compatible with the rights of the Parties and the fairness and efficiency of the arbitral process (...) others might benefit from the experience (...) fairness and effectiveness and fairness and efficacy (...)”.

(FOLLOW): THE COUNTERCLAIMS

The procedural tools that are useful for the introduction of the judgment on sustainable development issues are part of the counterclaims, that is, the possibility for the host state to propose a counterclaim against the investor, who is the appellant and compensates the damage for the illegal behavior that has been obtained (Waibel, 2014). This is a tool that the host state did not enforce its violations of obligations and responsibilities on the part of investors. In this way, it allows to give symmetry to the procedural nature of the ISDS system without taking away from investors the relative and exclusive monopoly of their own claim (Griller, Obwexer, Vranes, 2017).¹⁰⁴

A counterclaim of the host state is defined in par. 1138 of the *Urbaser v. Argentina* case as a:

“(...) reaction to the main claim (...) as it refers to the same dispute (...)”¹⁰⁵.

¹⁰⁴Griller, Obwexer, Vranes affirmed that: “(...) international investment law provides a cause of action for investors against states to protect investments in a host state, but does not provide a cause of action for host states against investors (...) refutes attempts by states to bring counterclaims against investors (...)”.

¹⁰⁵*Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia*

The ICSID Convention has tried to regulate the counterclaim based on art. 46 as well as on the ICSID Arbitration Rules. It has asked for the consent of the parties and the connection with the obligation of the object of the claim:

“(...) directly out of the subject-matter of the dispute
 (...)”.¹⁰⁶

In a similar sense, art. 19.3 relating to the UNCITRAL arbitration rules states the:

“(...) statement of defence (...) respondent may make a counter-claim arising out of the same contract or rely on a claim arising

Ur Partzuergoa v. Argentina, ICSID Case No. ARB/07/26. Award, 8 December 2016.

¹⁰⁶Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentina, ICSID Case No. ARB/07/26, op. cit., part. 46: “(...) parties otherwise agree, the Tribunal shall, if requested by a party, determine any incidental or additional claims or counterclaims arising directly out of the subject-matter of the dispute provided that they are within the scope of the consent of the parties and are otherwise within the jurisdiction of the Centre (...)”. According to the ICSID Arbitration Rules see Rule n. 40, “Ancillary Claims”, lett. 1: “(...) parties otherwise agree, a party may present an incidental or additional claim or counter-claim arising directly out of the subject-matter of the dispute, provided that such ancillary claim is within the scope of the consent of the parties and is otherwise within the jurisdiction of the Centre (...)”.

out of the same contract for the purpose of a set-off (...)."

A close connection between the primary claim and the counterclaim is needed, i.e. a confirmation for the analysis that is carried out through the Saluka award that compares Art. 19.3. of the arbitration rules that come from UNCITRAL, Art. 46 of the ICSID Convention and Art. 2.1. of the Iran-US of the Claims Settlement Declaration. The award highlighted a general legal principle based on the counterclaim which constitutes:

"(...) indivisible whole of the primary claim asserted by the Claimant (...)." ¹⁰⁷

¹⁰⁷Saluka Investments B.V. v. The Czech Republic, UNCITRAL. Decision on Jurisdiction over the Czech Republic's Counterclaim, 7 May 2004, par. 76: "(...) reflect essentially the same requirement: the counterclaim must arise out of the "same contract" (UNCITRAL Rules, Article 19.3), or must arise "directly out of an investment" and "directly out of the subject-matter of the dispute" (ICSID, Articles 25(1) and 46), or must arise "out of the same contract, transaction or occurrence that constitutes the subject matter of [the primary] claims" (Article II(1) of the Claims Settlement Declaration) (...) is satisfied that those provisions (...) reflect a general legal principle as to the nature of the close connection which a counterclaim must have with the primary claim if a tribunal with jurisdiction over the primary claim is to have jurisdiction also over the counterclaim (...) indivisible whole with the primary claim asserted by the Claimant, or as invoking obligations which share with the

In the Urbaser case, the investors argued that the relevant counterclaims were not filed by the host state but were based on the BIT since the admission of the right of the countclaim is contrary to the object and purpose of the BITs themselves. The reasoning for the protection was granted by the investor and the investments. According to par. 1120:

“(...) investment Treaties do not impose obligations upon investors and, accordingly (...) the violation of the provision of any such Treaty as basis to sue an investor (...) a right to claim would run counter to the object and purpose of treaty arbitration (...) the investors a one-sided right of quasi-judicial review of national regulatory action (...)”.¹⁰⁸

primary claim ‘a common origin, identical sources, and an operational unity’ or which were assumed for ‘the accomplishment of a single goal (...)”.

¹⁰⁸Saluka Investments B.V. v. The Czech Republic, UNCITRAL. Decision on Jurisdiction over the Czech Republic’s Counterclaim, 7 May 2004, par. 1120: “(...) claimants assert in the first place that the asymmetric nature of BITs prevents a state from invoking any right based on such a treaty, not even a right to submit a counterclaim against an investor (...) aim of such treaties is, indeed, to protect the investor’s rights. BITs neither provide for the procedure for submission of state’s counterclaims nor even mention the right of an investor to submit counterclaims (...)”

The host state should present a counterclaim only in cases where the agreement for the parties of the former Art. 46 of the ICSID Convention had been reached, i.e. as the parties otherwise agree and that the BIT itself allowed¹⁰⁹ implicitly through a broad wording and on the modalities of its own clause of the ISDS (Briercliffe, 2017).¹¹⁰

that investment treaties do not impose obligations upon investors and, accordingly, that host states cannot rely on the violation of the provision of any such Treaty as basis to sue an investor (...) right to claim would run counter to the object and purpose of treaty arbitration, which is to grant the investors a one-sided right of quasi-judicial review of national regulatory action (...) claimants acknowledge the right of states to file counterclaims under the ICSID Convention, but they contend that such right cannot be exercised when a state is sued under a BIT (...)."

¹⁰⁹See also the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), art. 9.19.2: "(...) the respondent may make a counterclaim in connection with the factual and legal basis of the claim or rely on a claim for the purpose of a set off against the claimant (...)."

¹¹⁰Briercliffe affirmed that: "(...) tribunal was only able to entertain Argentina's counterclaim because, as discussed above, the jurisdiction clause of the specific BIT at issue was drafted broadly (...) provided that relevant jurisdictional requirements can be satisfied, the Urbaser decision potentially paves the way for states to bring human rights-based

This possibility was also verified in the Urbaser case and in the text of BIT Spain-Argentina of 1991, which allowed both parties to appeal according to par. 1125.¹¹¹ On the basis of the BIT the arbitral tribunal considered the counterclaim of Argentina¹¹² admissible thus making it obligatory to respect human rights as part of investors and in relation to the right to water, as a human right. In particular, in the Urbaser case the analysis of the related admissibility requirements for the counterclaim accepts a reasoning for Argentina, which was based on Art. 46 of the ICSID Convention. It was thus verified that some of the

counterclaims in investment treaty arbitration in future (...) development relevant to both states and investors. Should states prevail in future cases, this may expose investors to financial liability (...)”.

¹¹¹See par. 1143 “(...) is confirmed in Article X(3), stating that in certain circumstances the dispute may be submitted to an international arbitral tribunal “at the request of either party to the dispute (...) clearly from these provisions that either the investor or the host state can be a party submitting a dispute in connection with an investment to arbitration (...)”.

¹¹²See par. 1150 “(...) Tribunal therefore finds that the BIT accepts a possibility for Respondent to raise a counterclaim in the instant case (...) Article X of the BIT provides for a possibility of a host state submitting a claim or a counterclaim to international arbitration (...)”.

requirements listed in art. 46 were also met and the arbitral tribunal considered the jurisdiction of the host state over the counterclaim.¹¹³

In the Burlington case, the ICSID arbitral tribunal of 2017¹¹⁴ declared the counterclaim admissible from the agreement of the parties, stating in par. 60:

“(...) Tribunal’s jurisdiction in respect of Ecuador’s counterclaims is not challenged, and rightly so (...) derives from an agreement entered into by the Parties on 26 May 2011 (...)”

satisfying three conditions of ex Art. 46 of the ICSID

¹¹³See par. 1135: “(...) Respondent states the principle retained in Article 46 of the ICSID Convention, whereby ICSID tribunals are under an obligation to determine any counterclaim filed by a party, provided that it arises directly out of the subject-matter of the dispute, is within the scope of the consent of the parties and is otherwise within the jurisdiction of the Centre. ICSID tribunals are under an obligation to resolve such claims provided that all applicable conditions are met (...) tribunal concludes that it has jurisdiction to deal with Respondent’s Counterclaim in accordance with Articles 25 and 46 of the ICSID Convention and Article X of the BIT, and that this claim is admissible to be examined on the merits (...)”.

¹¹⁴Burlington Resources Inc. v. Ecuador, ICSID Case No. ARB/08/5. Decision on Counterclaims, 7 February 2017.

Convention.¹¹⁵ This procedural remedy, in the text of the IIAs, has tried to overcome the asymmetric nature of the ISDS (Bonfanti, De Luca, 2020)¹¹⁶ thus risking to accompany an imposition of liability that obliges investors.

As provided by the India Draft Model BIT in 2015, the related provision of the right to counterclaim for the host state was accompanied by the introduction of specific obligations for investors, namely compliance with the national legislation of the host state, anti-corruption, tax obligations and disclosure.¹¹⁷ The Aven and Urbaser awards

¹¹⁵Burlington Resources Inc. v. Ecuador, ICSID Case No. ARB/08/5. Decision on Counterclaims, op. cit., par. 62: “(...) agreement just described deals with jurisdiction over counterclaims, one must in addition refer to Article 46 of the ICSID Convention. Article 46 allows for counterclaims arising directly out of the subject-matter of the dispute provided that they are within the scope of the consent of the parties and are otherwise within the jurisdiction of the Centre (...)”.

¹¹⁶Bonfanti, De Luca affirmed that: “(...) free-standing counterclaims (...) would contribute to rebalancing IIAs’ asymmetrical character. Such counterclaims, as opposed to defensive counterclaims, would allow tribunals to take a holistic approach to disputes, and to adjudicate, alongside countries’ breaches of IIAs, the consequences of investors’ non-compliance with human rights obligations (...)”.

¹¹⁷See art. 14.11(i): “(...) a Party may initiate a counterclaim against

have render possible to understand the relative attitude as substantive case law for the counterclaim.

THE RULES OF UNCITRAL ON TRANSPARENCY

The mechanisms of publicity and transparency in the relevant ISDS procedures recall rules that are adopted by the working group of UNCITRAL, namely the Rule on Transparency of the UNICTRAL.¹¹⁸ They provided for the publication, according to art. 3, of a series of documents in arbitration proceedings. According to art. 44 they offered the possibility to the *amicus curiae* to submit written observations relating to the scope of the dispute and the public hearings.

These are rules of an automatic nature, i.e. on a default

the Investor or Investment for a breach of the obligations set out under Articles 9, 10, 11 and 12 of Chapter III of this Treaty before a tribunal established under this Article and seek as a remedy suitable declaratory relief, enforcement action or monetary compensation (...)."

¹¹⁸Rules on Transparency in Treaty-based Investor-State Arbitration, adottate dal "Working Group on Arbitration and Conciliation" (WG II) of 11 July 2013 and approved by UNGA on 16 December 2013 with the Resolution n. 68/109.

basis for ISDS disputes that arise from IIAs and that are concluded after 1st April 2014. They also provide for the UNCITRAL arbitration rules¹¹⁹ with the exception of the opting-out possibility of the parties.¹²⁰

In the arbitrations based on IIAs concluded after 1st April 2014 the states parties wanted to use the rules of transparency, reached on an agreement among themselves inserting also a reference to the UNICTRAL Rules.

In order to facilitate the application of the rules of transparency, the idea arose to make available to the states a single instrument capable of covering all the IIAs that were concluded before 1st April of 2014. The UN Convention on Transparency in Arbitration for Investors and the state opened with the signature of 2015. In this regard, the Mauritius Convention was entered into force on

¹¹⁹See the rules of UNCITRAL and from CETA art. 8.36.

¹²⁰Art. 1 of the rules affirmed that: “(...) UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (“Rules on Transparency”) shall apply to investor-state arbitration initiated under the UNCITRAL Arbitration Rules pursuant to a treaty providing for the protection of investments or investors (“treaty”) concluded on or after 1 April 2014 unless the Parties to the treaty have agreed otherwise (...)”.

18 October 2017.¹²¹ This is a treaty that applies the rule of transparency at a temporal level.

The IIAs were concluded before 1st April 2014 and the procedural level applied the mechanism of the ISDS. In art. 2, it was stated that:

“(...) any investor-state arbitration, whether or not initiated under the UNCITRAL Arbitration Rules (...)”.

The convention established an exception-based approach thus maximising its scope. It was a negative-list approach which prevented in art. 3 of the rules on transparency. They were applied to all the IIAs before 1st April 2014. This mechanism operates and it is necessary. The home and the host state have ratified the Mauritius convention without excluding the IIA. Furthermore, the dispute of ISDS was based on the application of its own convention. This means that it operates on the basis of the principle of reciprocity (Reith, 2015).

¹²¹United Nations Convention on Transparency in Treaty-based Investor-State Arbitration, Resolution A/RES/69/116.

PROTECTION OF RIGHTS IN CASE-LAW. LIMITS AND EXCESSES

Sustainable development and the protection of human rights also go together in the area of Investor-State disputes in international investment law and within the decision-making logic. Sustainable development gives rise to judgments that have been going on since 2001 and in 2012 between African supranational courts, that concern foreign oil investments in Nigeria as a defense for human rights and for a healthy environment that threatens oil pollution in the Niger Delta.

The decisions cited from Art. 24 of the Banjul Charter, namely the African Charter on Human and Peoples' Rights, provides for the protection of the environment as a collective right for peoples that is enshrined in art. 16 which states:

“(...) peoples shall have the right to a general satisfactory environment favourable to their development (...)”

with a distinct and autonomous way that respects the right to health. The sentence of 2001 on the SERAC v. Nigeria case was issued by the African Commission on Human and Peoples' Rights.

The Commission cited sustainable development by stating the:

“(...) right to a general satisfactory environment, as guaranteed under Article 24 of the African Charter or the right to a healthy environment (...) imposes clear obligations upon a government (...) state to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation (...) ecologically sustainable development and use of natural resources (...)”¹²².

The SERAP v. Nigeria, is a case before the Court of Justice of ECOWAS-Economic Community of West African States¹²³ and part of the Nigerian NGO of the Socio-Economic Rights and Accountability Project (SERAP). The ECOWAS Court has highlighted the right of peoples to a healthy environment, according to ex Art. 24 of the Banjul Charter, which constitutes a means for the states to obtain concrete

¹²²The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria, African Commission on Human and Peoples’ Rights, Communication No. 155/96, decision of 13 October 2001, par. 52.

¹²³SERAP v. Nigeria, Judgment n. ECW/CCJ/JUD/18/12, General List n. ECW/CCJ/APP/08/09. ECOWAS Court of Justice, 14 December 2012.

results.¹²⁴ As an obligation of means that every state adopts the relevant measures necessary to maintain the quality of the environment, indivisible and integrated with the way that satisfies the sustainable development of its inhabitants, as stated in par. 101:

“(...) article 24 of the Charter requires every state to take every measure to maintain the quality of the environment understood as an integrated whole (...) environment may satisfy the human beings who live there, and enhance their sustainable development (...)”.

The ECOWAS Court thus declines sustainable development in the form of a principle of participation for a civil society in the relevant environmental decisions. The Court

¹²⁴See also par. 100: “(...) duty assigned by Article 24 to each State Party to the Charter is both an obligation of attitude and an obligation of result. The environment, as emphasised by the International Court of Justice (...) not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn (...) (Legality of the threat or use of nuclear arms, ICJ Advisory Opinion of 8 July 2006, paragraph 28). It must be considered as an indivisible whole, comprising the ‘biotic and abiotic natural resources, notably air, water, land, fauna and flora and the interaction between these same factors’ (International Law Institute, Resolution of 4 September 1997, Article 1) (...)”.

recognizes the right to take legal action, i.e. *locus standi* for the NGO SERAP, which it invoked in Art. 2 of the Convention of Aarhus¹²⁵ as well as via art. 56 and 58 the

“(...) evidence of an international *communis opinio juris* (...) large consensus in International Law that when the issue at stake is the violation of rights of entire communities, as in the case of the damage to the environment, the access to justice should be facilitated (...)”.¹²⁶

¹²⁵See par. 57 of the sentence: “(...) Article 2 (5) of Convention of “Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matter” defines the “public concerned” with environment protection as “public affected or likely to be affected by, or having an interest in the environment decision-making for the purposes of this definition non governmental organization promoting environment and meeting requirements under national law shall be deemed to have an interest (...)”; and in par. 58: “(...) convention is not a binding instrument on African States, its importance, as a persuasive evidence of an international *communis opinio juris* in allowing NGOs to access the Courts for protection of Human Rights related to the environment, cannot be ignored or underestimated by this court (...)”.

¹²⁶According to par. 112: “(...) Court concludes and judges that the Federal Republic of Nigeria (...) respect of the continuous and unceasing damage caused to the environment in the Region of Niger Delta, has defaulted in its duties in terms of vigilance and diligence as party to the African Charter on Human and Peoples’ Rights, and has violated

The decision of the regional court in 2012, namely of the Inter American Court of Human Rights in *Sarayaku v. Ecuador* case declines sustainable development in terms of respect for human rights and indigenous peoples according to principle no. 22 of Rio. The appeal was promoted by an NGO, namely the “Centro de Derechos Economicos y Sociales” as a representative of the indigenous population of Sarayaku, who lived in an Amazonian forest and were affected by oil extraction works by the Argentine investor company.

The Court held that Ecuador violated, after the authorization of the mining concession, the property rights of the Sarayaku people thus condemning it to a compensation of one million dollars.

This is a decision that recognized the ILO Convention no. 169 of 1989 on the rights of indigenous and tribal peoples. According to art. 6 it imposed on states obligations of consultation in good faith and with the aim also of:

“(...) agreeing or consenting to the proposed measures
 (...)”.

This is a guiding principle that thus allowed indigenous

Articles 1 and 24 of the said instrument (...)”.

peoples to make informed decisions according to art. 7 and 15:

“(...) peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy (...) rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded (...) include the right of these peoples to participate in the use, management and conservation of these resources (...)” (Voon and others, 2015).

The UNGA resolution of the UNDRIP has asked states to cooperate and consult in good faith in order to obtain the free, prior and informed consent of indigenous peoples before adopting legislative or administrative measures or projects that affect territories where they live and exploit their resources.¹²⁷

¹²⁷UNGA, United Nations Declaration on the Rights of Indigenous Peoples, Res. A/RES/61/295 of 13 September 2007, art. 19: “(...) States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them (...)”. Art.32(2): “(...) States shall consult and cooperate in good

The IACtHR has incorporated standards from national legislation in countries that have not ratified the convention. According to the court, the obligation to consult indigenous peoples is a general principle of international law. In fact, the:

“(...) obligation to consult, in addition to being a conventional standard, is also a general principle of International Law (...)”.¹²⁸

faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources (...)”.

¹²⁸See also par. 164: “(...) Member States of the Organization of American States have incorporated these standards into their domestic legislation, and through their highest courts (...) number of domestic courts of the countries in the region that have ratified ILO Convention No. 169, have made reference to the right to prior consultation pursuant to the provisions of that agreement (...) courts of countries that have not ratified ILO Convention No. 169 have also referred to the need to carry out prior consultations with indigenous, native or tribal communities regarding any administrative or legislative measure that directly affects them, as well as on the exploitation of natural resources in their territory (...) the obligation to consult, in addition to being a

The relevant decision was not included in the ICSID award of the Bear Creek Mining v. Peru case of 2017, which concerned the application of ILO Convention No. 169. It was ratified by Peru in relation to a Canadian investment in a mining project.¹²⁹ The protests for the uprising of the Aymara indigenous community, who inhabited the affected lands, were considerable. The host state decided to revoke the mining concession.

The appeal in the ICSID of the investor concerned the complaint of indirect expropriation. Peru caused a conduct for the Canadian investing, company which according to allegations of the *amicus curiae*, acted without a social license.

The thesis of the *amicus curae* was in accordance with the concept that “social license of foreign investments” stems from the RSI, from the UNGPs, as well as from the relevant

conventional standard, is also a general principle of international law (...) nowadays the obligation of states to carry out special and differentiated consultation processes when certain interests of indigenous peoples and communities are to be affected is an obligation that has been clearly recognized (...).’’

¹²⁹Bear Creek Mining Corporation v. Peru, ICSID Case No. ARB/14/21. Award, 30 November 2017.

instruments of international law for the defense of indigenous peoples, as noted in art. 32(2) UNDRIP.¹³⁰ This is a view of the *amicus curiae* that is supported by the host state¹³¹ without a control, however, by the arbitral tribunal that is known from the ILO Convention No. 169 as well as by

¹³⁰See also par. 227: “(...) 2008 and 2011, a company was responsible for respecting all human rights and, as part of that responsibility, it had the obligation to obtain consent of the local population to its operations in order to ensure its own sustainability. Claimant knew or should have known about these human rights standards, but either ignored them or failed to put them into practice (...) “social license” is closely related to the responsibilities of business enterprises to respect human rights (...) social license to exist, there must be legitimacy, trust, and consent - none of which existed or exist with regard to the Santa Ana Project (...)”.

¹³¹See also par. 328 of award: “(...) Respondent urges the Tribunal to find Claimant’s claims inadmissible if it were to find that Claimant lacked a social license to build and operate the Santa Ana Project because it failed to comply with international standards when designing and executing its community outreach program (...)”; and in par. 256: “(...) internationally-accepted concept of the “social license” aligns closely with the requirements under Peruvian law. It is clear that Claimant failed to comply with internationally recognized norms (...) company obtains the necessary social license if and only if it is generally accepted by the relevant communities (...) social license is a *de facto* acceptance of

other relevant instruments of international law. It does not impose direct obligations on foreign investing companies

“(...) though the concept of ‘social license’ is not clearly defined in international law, all relevant international instruments are clear that consultations with indigenous communities are to be made with the purpose of obtaining consent from all the relevant communities (...) Tribunal is entitled to take the Convention into account in determining whether the Claimant carried out its obligation to give effect to the aspirations of the Aymara peoples in an appropriate manner (...)”.

The arbitral tribunal considered that the host state has failed to provide evidence, according to par. 411. So the act of revocation of the concession considered a violation of the FET and the sentence of the host state to damages equal to 18 million USD. The Bear Creek Mining award also cited the Urbaser award in 2016 examining an innovative approach to the protection of rights, such as a balance of economic, environmental and social needs.

(FOLLOWS): THE IRON RHINE CASE

The Iron Rhine award dates back to 2005. It occurred after

the Project, there are few legal standards that can be applied to it (...)”.

the proclamation of independence of Belgium from the Netherlands in 1830, which was consecrated by the Treaty of Separation of 1839 and which provided, according to art. 12, a transit in favor of Belgium in Dutch territory through new roads, navigable canals that connected the port of Antwerp with the German region of Ruhr.

The Rhine railway connected from 1879 to 1991 Belgium to Germany through the Netherlands. In 1998, Belgium decided to activate the historic railway line that emerged from areas that had long been crossed and bound by nature reserves and parks in Dutch territory. The modernization works of the line, according to the position of the Netherlands, were suitable and with executive methods to a continuous increase in costs.

Belgium and the Netherlands made use of the services and structures of the Permanent Court of Arbitration based in The Hague.¹³² The arbitral tribunal first of all sought to resolve the interpretation of Art. 12 of the Treaty of Separation of 1839, which established the right of Belgium to build at its own expense a new canal road in Dutch

¹³²See also the Optional Rules for Arbitrating Disputes between Two States from CPA.

territory. This was a step which replaced the construction of the Iron Rhine railway line in the Treaty of 1873 and the distribution of costs in the case of modernization of the work thus providing for measures for the protection of the environment.

The works of upgrading the railway line are considered to be included and constitute a new opus according to art. 12 and the related costs were in principle to be borne only by Belgium. The arbitral tribunal argued that the evolutionary interpretation of art. 12 based on Art. 31, par. 3, letter c) VCLT invoked the principle of effectiveness to ensure the treaty to a lasting application updating thus its object and objectives.¹³³

¹³³According to par. 79: “(...) should be had in interpreting Article XII to juridical facts as they stood in 1839 (...) rule does not require the Tribunal to be oblivious either to later facts that bear on the effective application of the treaty, nor indeed to all later legal developments (...) therefore be necessary to read into Article XII, so far as the allocation of contemporary costs for upgrading is concerned, the provisions of international law as they apply today (...) restoration and upgrading of the line as requested by Belgium falls to be analysed by reference of Article XII of the 1839 Treaty of Separation-not because it amounts to a ‘new line’ (the Netherlands’ view) but rather because the object and purpose of the Treaty suggests an interpretation that would include within the ambit of the balance there

The arbitral tribunal also considered the Gabčíkovo-Nagymaros. The award of 2005 in paras. 112 and 140 of the judgment supported an evolutionary interpretation for the application of environmental norms and standards.

In this regard, the arbitral tribunal stated in para. 80 that:

“(...) seems that an evolutive interpretation, which would ensure an application of the treaty that would be effective in terms of its object and purpose, will be preferred to a strict application of the intertemporal rule (...) the International Court was prepared to accept, in interpreting a treaty that predated certain recent norms of environmental law, that the Treaty is not static, and is open to adapt to emerging norms of international law (...)”.

These were new norms of tribunals that were established in the field of environmental protection, according to par. 140 of the ICJ judgment. In par. 59 it stated:

“(...) dictum applies equally to the Iron Rhine railway (...)”.¹³⁴

struck new needs and developments relating to operation and capacity (...)”.

¹³⁴See also par. 59: “(...) Tribunal would recall the observation of the International Court of Justice in the Gabčíkovo-Nagymaros case that ‘[t]his need to reconcile economic development with protection of the

The arbitral tribunal stated so and referred to sustainable development without investigating its legal nature. According to par. 58:

“(...) principles, whatever their current status, make reference to conservation, management, notions of prevention and of sustainable development, and protection for future generations (...)”.

These were principles that integrated economic development with environmental protection. Par. 59, 221 and 223 stated, in this regard, that:

“(...) these emerging principles now integrate environmental protection into the development process (...) economic development is to be reconciled with the protection of the environment, and, in so doing, new norms have to be taken into consideration, including when activities begun in the past are now expanded and upgraded (...) reactivation of the Iron Rhine railway cannot be viewed in isolation from the environmental

environment is aptly expressed in the concept of sustainable development (...) clarified that new norms have to be taken into consideration (...) new standards given proper weight, not only when states contemplate new activities but also when continuing with activities begun in the past (...) According to the Tribunal this dictum applies equally to the Iron Rhine railway (...)”.

protection measures necessitated by the intended use of the railway line (...)."

The relevant award highlighted some basic elements important for sustainable development, namely: - the interdependence link between environment and development; - the activities that were linked to economic development that integrated environmental protection as a duty and without causing harm; - principle no. 4 of the Rio Declaration that was consolidated according to the rules of customary international law.

These are considerations that are part of par. 59 which stated:

"(...) environmental law and the law on development stand not as alternatives but as mutually reinforcing, integral concepts, which require that where development may cause significant harm to the environment there is a duty to prevent, or at least mitigate, such harm (...) has now become a principle of general international law (...)."

The award concluded the related environmental protection needs that were not foreseen in the distant treaty of 1839 but were integrated into the modernization works in the Iron Rhine and Belgium line. It is an evolutionary interpretation that highlighted the expenses between the

two countries and the segments related to the reduction of traffic and road safety, reduced noise and the careful balancing able to reconcile as soon as possible the economic development that respected the environment.¹³⁵

The topic was also the respect for the environment that emerged from the ICSID Parkerings award without mentioning sustainable development.¹³⁶

It was Vilnius as a UNESCO world heritage city that contracted a Norwegian investor for the construction of a parking lot in the historic center of the capital revoking the contract in favor of a Dutch investor for a project that had invasive dimensions to the urban environmental plan.¹³⁷

¹³⁵See par. 220: “(...) costs are not to be borne solely by Belgium as if it were ‘a new road’; but neither are they to be borne solely by the Netherlands. The financial obligations of the Parties must therefore be subjected to careful balancing (...) exercise of Belgium’s right of transit and the Netherlands’ legitimate environmental concerns are to be, as far as possible, reconciled (...)”.

¹³⁶Parkerings-Compagniet AS v. Lithuania, ICSID Case ARB/05/8. Award, 11 September 2007.

¹³⁷According to par. 369: “(...) essential condition of the violation of a MFN clause is the existence of a different treatment accorded to another foreign investor in a similar situation. Therefore, a comparison is necessary with an investor in like circumstances (...) a less favourable

The award highlighted that Lithuania had as a legitimate objective the public interest to justify the unequal treatment between two different investors.

In this regard, in paragraphs 392 and 396 it was stated that:

“(...) historical and archaeological preservation and environmental protection could in this case be a justification for the refusal of the project (...) the refusal by the Municipality of Vilnius (...) was justified by various concerns, especially in terms of historical and archaeological preservation and environmental protection (...)”.

These were positions that had as their objective to protect from an environmental, cultural and sustainable development point of view, a not indifferent notion even though it was not part of its decision.

(FOLLOWS): THE PHILIP MORRIS CASE

The right to public health and the exercise of the state's right to regulate was included in the ICSDI in the Philip Morris v. Uruguay case of 2016.¹³⁸ A case considered as a

treatment is acceptable if a state's legitimate objective justifies such different treatment in relation to the specificity of the investment (...)”.

¹³⁸Philip Morris Brands Sàrl, Philip Morris Products SA and Abal

turning point for the will to the court protect human rights within the context of requests from investors (Feria-Tinta, 2017).¹³⁹

This position also came from the Biwater case in 2008. It was the moment that the arbitral tribunal took the position of *amicus curiae*, stating in par. 308:

“(...) the *amicus curiae* submit that human rights and sustainable development issues are factors that condition the nature and extent of the investor’s responsibilities, and the balance of rights and obligations as between the investor and the host state (...) foreign corporations engaged in projects intimately related to human rights and the capacity to achieve sustainable development (such as the project here), have the highest level of responsibility (...) before seeking the protection of international law (...)”.

Hermanos SA v. Uruguay, ICSID Case No. ARB/10/7. Awaed, 8 July 2016.

¹³⁹Feria-Tinta affirmed that: “(...) Philip Morris v. Uruguay case represents a turning point in investment arbitration in Latin America, that of the willingness of investment arbitration to engage with human rights obligations in the context of investment claims (...) reflects the coming of age of investment arbitration (...) step taken by the Philip Morris tribunal, to centrally recognize the relevance of the right to health in resolving the dispute, nevertheless represents an important turning point in investment arbitration case-law (...)”.

Such cases have taken into account the decision that avoided a relevant balance between investor and host state thus demonstrating to establish its own importance.¹⁴⁰

Uruguay is a country with a high rate of smokers. It enacted in 2008 a tobacco consumption legislation according to the international obligations that are assumed, through the ratification in 2004 of the Framework Convention on Tobacco Control that was enacted in 2003 by the International Organization for Health.

The company Philip Morris considered that the legislation expropriated investments in the host state against the arbitral protection of ICSID based on the BIT between Uruguay and Switzerland as the registered office of the multinational.

The award highlighted that Uruguay protected the right to health of citizens thus excluding the anti-tobacco legislation, when the police power doctrine was exercised according to par. 287:

“(...) adoption of the Challenged Measures by Uruguay was a valid exercise of the state’s police powers, with the

¹⁴⁰Biwater Gauff (Tanzania) Ltd. v. Tanzania, ICSID case No. ARB/05/22. Award, 24 July 2008.

consequence of defeating the claim for expropriation (...)."

It was a doctrinal position that recognized the state to exercise control over property and people, ensuring the general interests of the community, such as public order, health and safety. A doctrine that guaranteed the rule of law and the regulation of the public interest. It protected the safeguard of public interests.

The award reconstructed the historical affirmation of international investment law. In this regard, in par. 291-300 it admitted that, according to:

"(...) Tribunal's view, these provisions, whether or not introduced *ex abundanti* caution, reflect the position under general international law (...)."

The doctrine of state' police power was established as a customary international norm in the ICSID Feldman Award

of 2002,¹⁴¹ in the Saluka Award of 2006,¹⁴² in the jurisdictional decision of the Saur's case in 2012¹⁴³ as well as in Art. 42, para. 1 of the ICSID Convention, as an applicable law (De Brabandere, 2019).¹⁴⁴ The arbitral tribunal sought to reinforce the OECD study of 2004, which in para. 294 stated

¹⁴¹Marvin Feldman v. Mexico, ICSID case No. ARB(AF)/99/1. Award, 16 December 2002, par. 103: “(...) governments must be free to act in the broader public interest through protection of the environment, new or modified tax regimes, the granting or withdrawal of government subsidies, reductions or increases in tariff levels, imposition of zoning restrictions and the like. Reasonable governmental regulation of this type cannot be achieved if any business that is adversely affected may seek compensation, and it is safe to say that customary international law recognizes this (...)”.

¹⁴²Saluka Investments B.V. v. The Czech Republic, UNCITRAL, partial decision, 17 March 2006, par. 262: “(...) the principle that a state does not commit an expropriation and is thus not liable to pay compensation to a dispossessed alien investor when it adopts general regulations that are ‘commonly accepted as within the police power of states’ forms part of customary international law today (...)”.

¹⁴³SAUR International S.A. v. Argentina, ICSID Case No. ARB/04/4. Décision sur la compétence et sur la responsabilité, 6 June 2012, par. 398: “Le fait que l’exercice légitime de pouvoirs de police ne constitue pas un délit international est un principe général du droit international coutumier, communément accepté (...)”.

that:

“(...) an accepted principle of customary international law that where economic injury results from a *bona fide* non-discriminatory regulation within the police power of the state, compensation is not required (...)”.

¹⁴⁴See also art. 42, lett. 1: “(...) Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the contracting state party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable”. Another example of Art. 26(6) ECT helps us to decide “the issues in dispute in accordance with this Treaty and applicable rules and principles of international law (...)”. De Brabandere affirmed that: “(...) any legal dispute arising directly out of an investment” affirmed that: “(...) the direct access of foreign investors to investment treaty arbitration is only accepted because it is part of the protection offered to the investor for claims arising out of the investment, the competence of the arbitral tribunal is at the same time limited to these types of disputes (...) limited scope of jurisdiction of an arbitral tribunal does not imply that the tribunal cannot as a matter of principle consider human rights issues raised by either party as applicable law (...) specific human rights-related rule in the treaty itself, which would render the application of human rights law straightforward, compromissory clauses in investment treaties usually contain broad applicable law clauses referring to the application, besides domestic law, of ‘international law’. Consequently, it cannot be excluded as a matter of principle that arbitral

In 2010, the Chemtura award clarified the requirements and limits relating to the lawfulness of the state police power, which was understood as a state action, which according to par. 254:

“(...) an arbitrary manner since it respected due process and was based on valid science; (ii) it was non-discriminatory; (iii) it was not excessive; and (iv) it was made in good faith (...)”.

This was a measure which constituted a valid exercise of the state police power. Therefore, it did not constitute expropriation.¹⁴⁵ In 2012, the Saur case reaffirmed these

tribunals can engage with human rights law, quite the contrary (...)”.

¹⁴⁵Chemtura Corporation v. Canada, UNCITRAL. Award, 2 August 2010, par. 266: “(...) Tribunal considers in any event that the measures challenged by the Claimant constituted a valid exercise of the Respondent’s police powers. As discussed in detail in connection with Article 1105 of NAFTA, the PMRA took measures within its mandate, in a non-discriminatory manner, motivated by the increasing awareness of the dangers presented by lindane for human health and the environment (...) adopted under such circumstances is a valid exercise of state’s police powers and, as a result, does not constitute an expropriation (...) decision of the PMRA to de-register lindane meets the test of this doctrine because (i) it was not made in an arbitrary manner since it respected due process and was based on valid science; (ii) it was non discriminatory; (iii) it was not excessive; and (iv) it was made in good faith (...)”.

types of requirements.¹⁴⁶ It was the arbitral tribunal, which through par. 399 and 418 stated:

“(...) investment tribunals should pay great deference to governmental judgments of national needs in matters such as the protection of public health (...) fair and equitable treatment standard is not a justiciable standard of good government, and the tribunal is not a court of appeal (...)”.¹⁴⁷

¹⁴⁶SAUR International S.A. v. Argentina, ICSID Case No. ARB/04/4. Décision sur la compétence et sur la responsabilité, 6 June 2012, par. 401: “(...) L’exercice des pouvoirs de police est légitime s’il est réalisé conformément aux normes d’application générale, de manière non discriminatoire, de bonne foi et en défense de l’intérêt général, et sans que l’État ne se soit préalablement soustrait à ses obligations (...)”.

¹⁴⁷See also par. 399: “(...) investment tribunals should pay great deference to governmental judgments of national needs in matters such as the protection of public health. In such cases respect is due to the ‘discretionary exercise of sovereign power, not made irrationally and not exercised in bad faith (...) involving many complex factors (...) sole inquiry for the Tribunal (...) whether or not there was a manifest lack of reasons for the legislation (...) deference is due in that regard to national authorities’ decisions as to the measures which should be taken to address an acknowledged and major public health problem. The fair and equitable treatment standard is not a justiciable standard of good government, and the tribunal is not a court of appeal (...)”. See also from the ICSID Urbaser, op. cit., par. 628: “(...) host state is hit, for instance, by

In 2007, the ICSID in the *Parkerings* case highlighted in para. 422 the sovereign right of the host state. According to para. 333:

“(...) businessman or investor knows that laws will evolve over time”, (par. 332) and therefore must adapt their investment to changes (...)”.¹⁴⁸

The arbitral tribunal concluded that the anti-smoking legislation did not constitute expropriation. It also adopted non-discriminatory measures excluding health protection

an epidemic threat to the health of a very large amount of people, it has to take all measures required by the situation even if this implies hurting investors’ interests, provided that the authorities proceed with deference to those interests and with the aim to restore their efficient preservation as soon as the circumstances so allow (...)”.

¹⁴⁸*Parkerings-Compagniet AS v. Lithuania*, ICSID Case No. ARB/05/8. Awaed, 11 September 2007, par. 332: “(...) State’s undeniable right and privilege to exercise its sovereign legislative power (...) modify or cancel a law at its own discretion. Save for the existence of an agreement, in the form of a stabilisation clause or otherwise, there is nothing objectionable about the amendment brought to the regulatory framework existing at the time an investor made its investment (...) businessman or investor knows that laws will evolve over time (...)”; and in par. 333: “(...) investor must anticipate that the circumstances could change, and thus structure its investment in order to adapt it to the potential changes of legal environment (...)”.

for Uruguay. It, finally, constituted the exercise of police powers as valid.¹⁴⁹ The appeal was dismissed as the investor was ordered to reimburse legal costs that amounted to USD 7 million.

(FOLLOW): THE URBASER CASE

The positions of the Urbaser award in 2016 together with those of Philip Morris have opened the way for the treatment of human rights within the context of clean water and the analysis for the dispute (Feria-Tinta, 2017). The award recognized the respect for human rights and the obligation that weighed on the investing company by

¹⁴⁹See also from par. 307: “(...) Tribunal concludes that the Challenged Measures were a valid exercise by Uruguay of its police powers for the protection of public health. As such, they cannot constitute an expropriate (...)”. See also the case: ICSID Saur v. Argentina of 2012, par. 413: “(...) est indiscutable qu’un État souverain, pour cause d’utilité publique et agissant en défense de ce qu’il estime être l’intérêt général, peut décider à tout moment de nationaliser un service public essentiel comme l’est l’approvisionnement en eau potable et l’assainissement. Mais, une fois l’investissement appartenant à un investisseur étranger protégé par l’APRI exproprié, l’État ne peut passer outre à son obligation internationale, énoncée dans l’APRI lui-même, d’indemniser à leur valeur réelle les actifs dont elle a été privée (...)”.

affirming its subjectivity in international law. Thus, the competence to receive a counterclaim that was advanced by the host state is declared (Attanasio, Sainati, 2017).¹⁵⁰

The case originated with the awarding of a contract by Argentina and two Spanish investor companies for the water and sewerage management service and a large metropolitan area in the capital with the corresponding obligation for the investor to enhance the expansion of the network. The serious economic crisis hit the country between 2001 and 2002. The government adopted exceptional measures that led to the freezing of tariffs for public services and the revocation of privatizations, thus expropriating the plaintiffs of their investment.

In the 1990s, Argentina privatized the water and wastewater treatment service, attracting investments from

¹⁵⁰Attanasio, Sainati affirmed that: “(...) Urbaser Tribunal recognized corporate human rights obligations. It may seem surprising that an investment tribunal, rather than a human rights body, was the first to do so (...) international human rights fora lack the jurisdiction to resolve claims against corporations, while investment tribunals-like Urbaser-can assert jurisdiction over international law counterclaims against corporations (...) positioned to arrive at novel conclusions about international law as it applies to corporations (...)”.

some foreign companies, including the Spanish companies Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa (CAAB). Both were majority shareholders in the Argentine company “Aguas del Gran Buenos Aires S.A.” (AGBA) which in 2000 was awarded a concession contract for water and sewerage services with the Province of Greater Buenos Aires.

The contract also included the obligation for the investor to strengthen the existing water network, through new investments for the connection of new users, extending these public services to the high percentage of the population that did not yet benefit from them.

As a result of the serious economic crisis of 2001, the government adopted a series of exceptional measures to deal with the recession, from the drastic devaluation of the peso to the “corralito” or freezing of bank accounts, as well as the freezing of public service tariffs (paragraphs 34, 69 of the award).

The two Spanish companies invoked the failure to comply with the BIT concluded in 1991 by Spain with Argentina and decided in 2007 to bring the matter before the ICSID Centre, considering the aforementioned emergency

measures a violation of the FET obligation. Argentina's decision to freeze the rates of privatized services in 2002, followed in the following years by a less than transparent renegotiation of the contract with AGBA, culminated in 2006 with the revocation of the concession and consequent nationalization of the water service.

Argentina argued that the applicants were in breach of and suffered contractual enforcement duties for the expansion of a water network. According to para. 36, efficient should be to provide even a minimal investment “for the first years of operation”.

On the other hand, it was justified that the measures adopted out of necessity and the state that had the right to guarantee water as a fundamental right had a role in a new voice, that of UNGA of 2010 relating to Resolution no. 64/292.¹⁵¹

The final document of the UN Rio+20 Conference of 2013 stated in par. 119, 121 that the:

¹⁵¹UNGA, Resolution A/RES/64/292, adopted on 28 July 2010, art. 1: “(...) recognizes the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights (...)”.

“(...)water is at the core of sustainable development (...) in full respect for national sovereignty (...)”.¹⁵²

The agenda 2030 through SDG n.6 provided for a universal and equitable access to drinking water. Argentina could propose a counterclaim for damages against foreign investors, according to par. 36. The arbitral tribunal was competent for this type of counterclaim and rejected obligations for investors.

The award was based on a systemic interpretation of BIT, namely Art. 31, par. 3, letter c) VCLT. It highlighted a legal isolation of the BIT, which according to par. 555 and 1200 a:

“(...) BIT is not a set of self-contained rules (...) a BIT cannot be interpreted and applied in a vacuum (...) the BIT’s special purpose as a Treaty promoting foreign investments, but it cannot do so without taking the relevant rules of international law into account (...) a BIT

¹⁵²See also par. 119: “(...) water is at the core of sustainable development as it is closely linked to a number of key global challenges. We therefore reiterate the importance of integrating water into sustainable development, and underline the critical importance of water and sanitation within the three dimensions of sustainable development (...)”; and par. 121: “We reaffirm our commitments regarding the human right to safe drinking water and sanitation, to be progressively realized for our populations, with full respect for national sovereignty (...)”.

has to be construed in harmony with other rules of international law of which it forms part, including those relating to human rights (...).¹⁵³

BITs have applied the law of the host state and general international law in a joint and harmonious manner.¹⁵⁴ The 2017 Bear Creek Mining award highlights a systemic interpretation that recalls par. 1200 and 1202. In the Urbaser case, Art. 31, par. 3, letter c) VCLT and Art. 42, par. 1 of the ICSID Convention are applied as applicable laws which allow for the “rules of international law to be applicable”.¹⁵⁵

¹⁵³According to par. 1990: “(...) effectiveness of a treaty rule denotes the need to avoid an interpretation which leads to either an impossibility or absurdity or empties the provision of any legal effect (...)”.

¹⁵⁴See also par. 1204: “(...) remains to be examined, in light of the openly framed provision of Article 31§3(c) of the Vienna Convention, whether other parts of international law may be relevant in the instant case (...) terms are more favorable (...)”.

¹⁵⁵See also par. 10 of the award: “(...) Urbaser Tribunal further noted that the BIT being applied in that case ‘has to be construed in harmony with other rules of international law of which it forms part, including those relating to human rights’, and that Article 42(1) of the ICSID Convention together with the governing law clause of that BIT (Article X(5)) provided that ‘Tribunal shall apply the law of the host state and such rules of international law as may be applicable (...)’.

From a systemic interpretation the arbitral tribunal moves to the main tenets of human rights in the international context¹⁵⁶ and to the obligation of all parties, both private and public, not to infringe human rights including the right to water. Paragraphs 1199 and 1210 state, in this regard:

“(...) admitted that the human right for everyone’s dignity and its right for adequate housing and living conditions are complemented by an obligation on all parts, public and private parties, not to engage in activity aimed at destroying such rights (...) would be different in case an obligation to abstain, like a prohibition to commit acts violating human rights would be at stake. Such an obligation can be of immediate application (...) equally to individuals and other private parties (...)”.

The arbitral tribunal rejected the position of the principle that supported the applicants. It is recognized that multinational corporations enjoy their own subjectivity. It can be admitted that they are immune from becoming subjects of international law. The arbitral tribunal concludes by giving value to the corporate social responsibility in analogy with the host state that recalls the

¹⁵⁶See in par. 1197 the Resolution UNGA A/RES/64/292 of 28 July 2010.

global compact.¹⁵⁷

In 2017, in the Bear Creek mining award is noted that the arbitral tribunal considers a systemic interpretation of the ILO convention no. 169 on the rights of indigenous peoples. Therefore, it does not contain obligations for companies. In fact,

“(...) the Convention may not impose obligations directly on a private foreign investor as such does not, however, mean that it is without significance or legal effects for them (...)”.

The reference from par. 10 to par. 1199 of Urbaser award and the Bear Creek Mining award recognize as a legal effect to investors the obligation to abstain from harming the rights of indigenous peoples. In the:

¹⁵⁷According to par. 1161: “(...) Respondent conveys an understanding of human rights recognized in international law as being binding on individuals and therefore companies as well (...) the right to water is an essential human right that represents not only an obligation of states but also, and more importantly, a social right based on a policy to which the whole society has to contribute, based on the understanding of the United Nations. It is a fundamental right that the leading companies of the world have adopted in the Global Compact as being part of their corporate social responsibility (...)”.

“(...) Urbaser v. Argentina, the Tribunal noted that human rights relating to dignity and adequate housing and living conditions (...) not to engage in activity aimed at destroying such rights (...)”.

The tribunal accepts the relevant counterclaim of Argentina. The host state invokes the existence of an obligation for the applicant companies and the actual enjoyment of the right to water that is drinkable for the population. The arbitral tribunal notes that in international law the positive obligation has burdened the state.¹⁵⁸

The court distinguishes between the obligation to abstain from violating human rights and the positive obligation to realize this type of rights. The negative obligation to abstain does not violate human rights and the positive obligation adopts measures for the realization of rights that remain in the hands of the state. It fails to prove a violation

¹⁵⁸According to par. 1210: “(...) enforcement of the human right to water represents an obligation to perform. Such obligation is imposed upon states. It cannot be imposed on any company knowledgeable in the field of provision of water and sanitation services (...)”; par. 1208: “(...) human right to water entails an obligation of compliance on the part of the state (...) an obligation for performance on part of any company providing the contractually required service (...)”.

on the part of investors for the obligation to abstain and cannot identify an obligation to perform to them on which the counterclaim is based, i.e. the court that rejects on the merits (Bonfanti, De Luca, 2020).¹⁵⁹

The ICSID Aven Award¹⁶⁰ found that investors have rights based on IIAs and that they are recipients of obligations that share the position of Art. 1195 of the Urbaser Award.¹⁶¹

¹⁵⁹Bonfanti, De Luca affirmed that: “(...) the same argument justifying counterclaims’ admissibility - ‘it can no longer be admitted that companies operating internationally are immune from becoming subjects of international law,’ including human rights obligations-is the main factor causing their dismissal: the nature of human rights obligations as inter-state primary obligations makes it impossible to merely shift them from countries to corporations (...)”.

¹⁶⁰David R. Aven and Others v. Costa Rica, ICSID Case No. UNCT/15/3 (UNCITRAL arbitration rules). Award, 18 September 2018.

¹⁶¹According to par. 738: “(...) international law of investments, particularly under DR-CAFTA (...) the investors enjoy by themselves a number of rights both substantive and procedural, including the right to sue directly the host state when it breaches its international obligations on foreign investment (Section A of Article 10 in DR-CAFTA) (...) Tribunal shares the views of Urbaser Tribunal that it can no longer be admitted that investors operating internationally are immune from becoming subjects of international law”.

As a consequence, it considers that the counterclaim of Costa Rica is admissible. It seeks compensation for damages, as a form of reparation for the violated ecosystems and for the condemnation of American investors. The construction of a large tourist resort on an area of a natural equilibrium compromises the measures of environmental protection of the host state.¹⁶²

The counterclaim was rejected and the obligations of the investors, according to art. 10.9 and 10.11 of the DR-CAFTA treaty, were an:

“(...) affirmative obligation upon investors (...) provide that any violation of state-enacted environmental

¹⁶²See also par. 689: “(...) Respondent has argued that Claimants undertook works that adversely impacted the Las Olas Project Site considerably, affecting the environment. The evidence rendered supports Respondent’s counterclaim, and hence, the Tribunal should order Claimants to repair the damages caused by their activity noting that (i) the Tribunal has jurisdiction over counterclaims under DR-CAFTA; (ii) Respondent has proven the existence of damages to the Las Olas ecosystem (...) the Tribunal does not find any reason of principle to declare inadmissible a counterclaim in which the Respondent State claims that the foreign investor has breached obligations falling within the scope of Article 10, Section A DR-CAFTA. Thus, the Tribunal has *prima facie* jurisdiction over the counterclaim filled in by the Respondent (...)”.

regulations will amount to a breach of the Treaty (...)”.¹⁶³

The considerations emerge from the counterclaim. This is an ineffective procedural tool that is not accompanied by the identification of specific obligations and by investors:

“(...) introducing human rights into ICSID arbitration will be to determine (...) which rights are capable of forming the basis of host state human rights counterclaim (...)” (Guntrip, 2017).

The conclusions reached at UNCTAD in 2019 are a modification that is in line with the substantive and procedural provisions of IIAs.¹⁶⁴ Thus, the award has

¹⁶³According to par. 743: “(...) Tribunal believes that the language of articles Article 10 .9.3.c and 10.11 seeks to ensure that states retain a significant margin of appreciation in respect of environmental measures in their respective jurisdictions, but they do not-in and of themselves-impose any affirmative obligation upon investors. Nor do they provide that any violation of state-enacted environmental regulations will amount to a breach of the Treaty which could be the basis of a counterclaim”; par. 747: “The Tribunal therefore concludes that the Counterclaim (...) should be dismissed”.

¹⁶⁴UNCTAD, Reforming investment dispute settlement: a stocktaking, IIA Issues Note, n.1, 2019, p. 4: “(...) reform of investment dispute settlement must not be viewed in isolation. It needs to be synchronized with reform of the substantive investment protection rules embodied in IIAs (...) reform of both substantive rules and rules on dispute

enhanced the ESI and at the same time is oriented towards a step that supports the legal personality of foreign investing companies placing an obligation to abstain (Crow, Lorenzoni, 2018).¹⁶⁵ This position is defined as an open door since the court has stated that:

“(...) door open for possible direct application of human rights obligations on investors while distinguishing between obligations to abstain from human rights violations, which could be directly applicable and obligations to perform, which are not (...)” (Kube, Petersmann, 2018).

CONCLUDING REMARKS

From the previous paragraphs we have understood that the

settlement needs to be oriented towards today’s sustainable development imperative (...)”.

¹⁶⁵Crow, Lorenzoni affirmed that: “(...) to find an obligation to perform on the part of the investor is the natural consequence of human rights law being tailored to bestow obligations on states, which makes efforts to extend such obligations to non-state actors feel like a procrustean task (...) voluntary undertaking of human rights through a CSR policy can bring international human rights obligations to the company level, where company performance -albeit functional- can be assessed (...)”.

arbitral case law has tried to outline a negative aspect that recalls sustainable development for decision-making purposes. No ICSID award has made textual reference to the principles of the declarations of New Delhi and sustainable development, thus bringing back to the content of the *amicus curiae* submissions.

The case law has recalled the awards, we have seen above, demonstrating that arbitral tribunals influence principle-based arguments, that make up the notion of sustainable development (Crockett, 2017). In particular, the Philip Morris and Urbaser awards are distinct and manifest the will of investments, that confront obligations in the field of human rights and in the request of investment protection. It is inherent that its reasoning and exercise thus balances interests for investors with the law of the state that regulates the public interest.

The contents for sustainable development, such as environment, human rights, participation, integration are facing a decisional moment that demonstrates the capacity of the principle to mediate conflicting interests, which confirms the potentiality of conflicts between laws and

principles (Voigt, 2013).¹⁶⁶

Overall, the awards through a systemic interpretation open the opportunity for arguments on human rights, thus influencing the outcome of arbitration that lacks the obligation of *stare decisis* that depends on the arbitral tribunals that exercise their interpretative discretions that continues this direction (Cotula, 2017).¹⁶⁷

Sustainable development as a tool for balancing investor-state relations and as a guide for conduct that invests in a

¹⁶⁶Voigt affirmed that: “(...) a general principle, sustainable development (...) plays an important role in the application and enforcement of international and national law, especially in the solution of legal disputes (...) also have a normative function if they are perceived as influencing directly or indirectly the outcome of judicial decisions (...) force of sustainable development can be exercised in a dispute settlement context. In this respect there is agreement that in the hands of judges, the principle could operate as some sort of ‘intervening principle’ mediating between potentially conflicting rules or principles (...)”.

¹⁶⁷Cotula affirmed that: “(...) award highlights the potential relevance of systemic integration (...) opening up opportunities for human rights arguments to influence the outcome of investor-state arbitration (...) much depends on how international tribunals will exercise the significant discretion that is intrinsic to applying systemic integration (...)”.

parameter that evaluates *ex post* the behavior of the investor, is a reality. It indicates that the realization of sustainable investments imposes a responsibility that realizes and allows to evaluate an arbitration dispute, as support for the investment made. Regulating the *ex post* evaluation of the investment and the investor's actions means protecting and safeguarding state prerogatives that transform the screening control systems on the admissibility of foreign investments in their territory.

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